No. 03-1570

Supreme Court, U.S.
FILED
JUN 2 1 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

STATE OF NEW YORK,

Petitioner,

—v.—

ANGEL L. MATEO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE NEW YORK STATE COURT OF APPEALS

BRIEF FOR THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

MICHAEL A. ARCURI
District Attorney
Oneida County,
New York and President,
New York State District
Attorneys Association
107 Columbia Street
Albany, New York 12210
(518) 432-1100

QUESTION PRESENTED

Whether *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) should remain an impediment to the New York State legislature's attempt to create a comprehensive and protective state death penalty statute that suffers from none of the infirmities identified in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), but that permits a defendant who is facing the death penalty to plead guilty and be assured a lesser maximum sentence than he would be eligible to receive if convicted after trial.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 4

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 20

APPENDIX

A. New York's 1995 Death Penalty Bill 1a

TABLE OF AUTHORITIES

PAGE

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) 18

Blackledge v. Allision, 431 U.S. 63, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977)..... 12

Brady v. United States, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) 12, 13, 15, 16

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978) 13, 14, 15, 16

Boyde v. California, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) 18

Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973) 13, 14, 15, 16

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 18

Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978).....14, 15, 16, 17, 18

Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) .....i, 2, 4, 5, 8

PAGE
PAGE

Gregg v. Georgia, 428 U.S. 153,
96 S.Ct. 2909, 49 L.Ed.2d 859
(1976) 1, 8, 9, 20

*Matter of Hynes v. Tomei, Matter of Relin
v. Connell*, 92 N.Y.2d 613,
684 N.Y.S.2d 177, 706 N.E.2d 1201
(1998), *cert. denied*, 527 U.S. 1015,
119 S.Ct. 2359, 144 L.Ed.2d 254
(1999) 2, 3, 4, 6, 19

McKleskey v. Kemp, 481 U.S. 279,
107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) 18

Pickens v. Lockhart, 714 F.2d 1455
(8th Cir. 1983)..... 17

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428,
153 L.Ed.2d 556 (2002) 17, 18

Ruiz & Denton v. State, 275 Ark. 410,
630 S.W.2d 44 *cert. denied*,
459 U.S. 882, 103 S.Ct. 181,
74 L.Ed.2d 148 (1982)..... 16

Santobello v. New York, 404 U.S. 257,
92 S.Ct. 495, 30 L.Ed.2d 427 (1971) 12, 13

Singer v. United States, 380 U.S. 24,
85 S.Ct. 783, 13 L.Ed.2d 630 (1965) 2

Smith v. Murray, 477 U.S. 527,
106 S.Ct. 2661, 91 L.Ed.2d 434
(1986) 18

Strickland v. Washington, 466 U.S. 668,
104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 18

PAGE
PAGE

United States v. Dominguez Benitez,
542 U.S. __, __ S.Ct. __, __ L.Ed.2d __
(June 14, 2004) 13

United States v. Goodwin, 457 U.S. 368,
102 S.Ct. 2485, 73 L.Ed.2d 74 (1982)..... 14

United States v. Jackson, 390 U.S. 570,
88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)..... *passim*

Walton v. Arizona, 497 U.S. 639,
110 S.Ct. 3047, 111 L.Ed.2d 511
(1990) 18

Woodson v. North Carolina, 428 U.S. 280,
96 S.Ct. 2978, 49 L.Ed.2d 944 (1978)..... 18

UNITED STATES CONSTITUTION

Fifth Amendment 3, 5, 10, 11

Sixth Amendment 3, 5, 10, 11

NEW YORK STATE CONSTITUTION

Article I, Sec. 2 ..... 2, 9

STATUTES

18 U.S.C. § 1201(a)..... 5, 11

N.Y. Penal Law § 125.27 ..... 1, 2, 8

N.Y. Criminal Procedure Law § 220.10 9

N.Y. Criminal Procedure Law § 320.10 2

N.Y. Criminal Procedure Law § 400.27 ..... 2, 8

INTEREST OF THE *AMICUS CURIAE* THE NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION[1]

The sixty-two District Attorneys of New York State, as represented by the New York State District Attorneys Association, have a keen interest in this Court's resolution of the question presented by this case in that they are charged with implementing the capital punishment scheme enacted by New York State's Legislature in 1995. The District Attorneys of New York State, accordingly, have an interest in the proper resolution of the question presented—whether a defendant charged with capital murder may plead guilty with the assurance that he will face a prison sentence rather than the death penalty—as such resolution will effect all future capital prosecutions in the state.

This brief is submitted upon the written consent of both of the parties to this proceeding.

STATEMENT OF THE CASE

On September 1, 1995, New York reinstated the death penalty for certain classes of murder. *See* N.Y. Penal Law § 125.27. The death penalty bill, which comprised thirty-one single-spaced pages and is annexed to this brief as Appendix A, codified all of this Court's post-*Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) decisions and went further in protecting accused capital murderers (e.g., the scheme limited capital punishment to those who committed their crimes after the age of eighteen [N.Y. Penal Law

[1] No counsel for any party to this proceeding authored this brief, in whole or in part. The New York Prosecutors Training Institute, a not-for-profit corporation created in 1995 by the New York State District Attorneys Association, contributed to the preparation and submission of this brief.

§ 125.27(1)(b)] and prohibited capital punishment for the mentally retarded [N.Y.C.P.L. § 400.27(12)]). The bill provided a comprehensive and protective scheme for the prosecution of capital defendants in New York and comported with New York's longstanding state constitutional prohibition of jury trial waivers for crimes that are punishable by death. N.Y. Const. Art. I, § 2; N.Y.C.P.L. § 320.10(1).

As part of this scheme, therefore, the New York statute requires that, when the State seeks the death penalty, the defendant's guilt must be determined at a jury trial to ensure that capital cases are "tried before the tribunal which the Constitution regards as most likely to produce a fair result." *Singer v. United States*, 380 U.S. 24, 36, 85 S.Ct. 783, 790, 13 L.Ed.2d 630, 638 (1965). Accordingly, if a defendant charged with Murder in the First Degree was convicted upon a guilty plea, he faced a maximum sentence of life without the possibility of parole. A defendant convicted after trial, however, faced a maximum sentence of death.

In *Matter of Hynes v. Tomei, Matter of Relin v. Connell*, 92 N.Y.2d 613, 684 N.Y.S.2d 177, 706 N.E.2d 1201 (1998), *cert. denied*, 527 U.S. 1015, 119 S.Ct. 2359, 144 L.Ed.2d 254 (1999), an interlocutory appeal in the case now before this Court on direct review, finding itself constrained by this Court's pre-*Furman* decision in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), the New York Court of Appeals declared that the plea provisions of New York's death penalty statute were unconstitutional and, finding the provisions severable, excised them from the statute. Specifically, the Court of Appeals held that, because the statute created "two levels of penalty for the same offense, imposing death only on those who assert innocence and proceed to trial," *Matter of Hynes v. Tomei*, 92

N.Y.2d at 620, 684 N.Y.S.2d at 179, 706 N.E.2d at 1203, the statute violated the federal constitution in the same way that the death penalty provision of the Federal Kidnaping Act did—the statutory sentencing disparity "imposed an impermissible burden" on the exercise of Fifth and Sixth Amendment rights by defendants who sought a jury trial, and "needlessly encouraged" defendants to waive these rights. *United States v. Jackson*, 390 U.S. at 583, 88 S.Ct. at 1217, 20 L.Ed.2d at 148. The New York high court felt it was obligated to reach this conclusion despite its acknowledgement that this Court had not "revisited Jackson and its progeny in 20 years and that these cases might be decided differently today in light of the increased significance of plea bargaining and substantial changes in the administration of capital punishment." *Matter of Hynes v. Tomei*, 92 N.Y.2d at 629, 684 N.Y.S.2d at 185, 706 N.E.2d at 1209.

The State filed a petition for a writ of *certiorari* in the *Hynes* and *Relin* cases, arguing that this Court should revisit its decision in *United States v. Jackson*, but that petition was denied on June 14, 1999. *Hynes v. Tomei*, 527 U.S. 1015, 527 S.Ct. 1015, 144 L.Ed.2d 254 (1999).

By the time the New York Court of Appeals had issued its decision in *Matter of Hynes v. Tomei and Matter of Relin v. Connell*, Angel Mateo had been tried and convicted of first-degree murder and, after a separate sentencing proceeding, was sentenced to death by the same jury that convicted him. Mateo appealed his judgment of conviction and sentence directly to the New York Court of Appeals arguing, among other things, that his death sentence must be vacated because he had proceeded to trial before the capital murder plea provisions were stricken from the statute in *Matter of Hynes v. Tomei*, at a time when his Fifth and Sixth Amendment rights were impermissibly burdened.

The State, in response, maintained that this Court's decision in *United States v. Jackson* had not stood the test of time, but argued additionally that, even if the New York Court of Appeals adhered to its just-pronounced ruling in *Matter of Hynes v. Tomei*, vacatur of defendant's death sentence was unwarranted. In a decision and order dated February 24, 2004, the New York Court of Appeals, rejecting the State's arguments, modified defendant's judgment of conviction by vacating his death sentence, and otherwise affirmed his conviction.

SUMMARY OF ARGUMENT

United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), stands as an impediment to the creation and implementation of a modern death penalty statute. The *Jackson* decision was premised on the then-prevailing notions that "death is different" and that the State and capital defendants were unequal adversaries at the plea-bargaining table. But as States, like New York, have crafted their death penalty statutes to comport with this Court's evolving capital jurisprudence, the concerns presented by the statute scrutinized in *Jackson*, a creature of the pre-*Furman* death penalty landscape, are no longer present. The bifurcation requirement, the requirement that jury sentencing discretion be appropriately channeled, and the additional protections afforded by New York's statute, such as the requirement that two capital-qualified counsel be appointed to represent capital defendants, have leveled the capital plea-bargaining playing field. Accordingly, a statutory scheme like New York's, which permits a death sentence only after a defendant's guilt has been established beyond a reasonable doubt to the satisfaction of a unanimous jury, neither "needlessly encourage[s]" guilty pleas nor

"impose[s] an impermissible burden" on the exercise of a defendant's Fifth and Sixth Amendment rights.

Nevertheless, the New York Court of Appeals, unlike the high court of Arkansas when analyzing a similar statutory scheme, believed that it was constrained to declare New York's capital plea provisions unconstitutional under *Jackson*. The petition for a writ of *certiorari* should be granted, therefore, so that this Court may decide the question explicitly left open in *Jackson*—whether the holding in *Jackson* should be applied to a modern, bifurcated death penalty scheme.

Alternatively, even if this Court is unpersuaded that the differences between New York's modern death penalty statute and that portion of the Federal Kidnaping Act condemned in *Jackson* are constitutionally significant, this Court should nevertheless grant the petition for a writ of *certiorari*. Review of this case would allow the Court to make explicit what this Court's post-*Jackson* plea bargaining cases, as well as this Court's decisions applying a uniform analysis to claims arising from both capital and non-capital cases, have made implicit—that application of *Jackson*'s rationale to a modern and comprehensive death penalty statute like New York's has inappropriately and unnecessarily limited the ability of prosecutors and capital defendants to engage in plea negotiations with the same freedom as non-capital defendants.

REASONS FOR GRANTING THE PETITION

This case presents the Court with the opportunity to declare for the first time whether the rationale of *United States v. Jackson*, pronounced when analyzing a pre-*Furman* death penalty statute (18 U.S.C. § 1201[a]), should apply to a death penalty statute that is altogether dif-

ferent. Alternatively, the case presents this Court with the opportunity to unequivocally announce that cases decided since *Jackson*, at the very least, render its rationale obsolete, or at most, overrule it. Accordingly, the New York State District Attorneys Association asks that the Court grant petitioner's petition for a writ of *certiorari*.

A. There Is No Jurisdictional Impediment to This Court's Review of the Instant Case.

Contrary to respondent's assertions, this Court may properly hear and decide the claims presented by defendant's case. Throughout defendant's direct appeal to the Court of Appeals, the State maintained—despite the fact that the New York high court had already rejected the claim in defendant's very own case—that *United States v. Jackson* was no longer good law and had not stood the test of time. *See* State's Brief in the New York Court of Appeals at 130.

The New York Court of Appeals necessarily rejected the State's argument when it vacated defendant's death sentence pursuant to its decision in the interlocutory appeal in the case, *Matter of Hynes v. Tomei and Matter of Relin v. Connell*. The Federal Constitutional claim at issue in this case, therefore, was adequately presented to, and decided by, the state court and is properly presented to this Court for review.

The "concession" to which defendant points in his brief in opposition to the petition does not change the analysis. The statements by the representatives of the Monroe County District Attorney and the New York State Attorney General were made during oral argument when asked to assume that the New York Court of Appeals was not going to abandon its recent holding in the interlocutory appeal in this very case, *Matter of*

Relin v. Connell. The State conceded it was bound by the law of the case, but in no way did the State concede that *United States v. Jackson* had continuing vitality. Accordingly, the issues presented in the petition for a writ of *certiorari* are properly before this Court.

B. The New York Court of Appeals Incorrectly Extended the Rationale of *United States v. Jackson* to an Altogether Different Statute.

The 1995 statute that reinstated the death penalty in New York does not, in any way, resemble the statute declared unconstitutional by this Court in *United States v. Jackson*. Accordingly, even if this Court were to adhere to the basic underpinnings of its holding in *Jackson*, New York's death penalty scheme is so different from the statute considered in *Jackson* that this Court should find that *Jackson* is inapplicable to New York's statute.

The death penalty statute scrutinized in *Jackson* and the death penalty statute enacted by the New York State Legislature in 1995, are so different that applying *Jackson* to the New York statute is unwarranted. Not only did the Federal Kidnaping Act reviewed in *Jackson* not require the death of the victim as a prerequisite to receiving a death sentence, the statute provided the defendant with a unitary trial in which the jury had unfettered sentencing discretion. In particular, the statute did not require the jury to balance aggravating and mitigating factors before deciding whether death was the appropriate sentence. In fact, the statute did not even allow the defendant to present mitigation evidence. *See United States v. Jackson*, 390 U.S. at 570-571, 88 S.Ct. at 1210-1211, 20 L.Ed.2d at 141. Rather, if convicted, death was the automatic penalty unless the jury found otherwise.

In stark contrast to the statute at issue in *Jackson*, the New York death penalty scheme severely confines the

discretion of a prosecutor to charge a defendant with a capital crime and a sentencing jury's discretion to impose a death sentence to a narrow set of circumstances, all of which require an intentional murder. *See* N.Y. Penal Law § 125.27. Moreover, the scheme provides for a bifurcated trial, in which the defendant's guilt and the penalty to be imposed are determined separately. *See* N.Y.C.P.L. § 400.27. Notably, in *Jackson*, this Court expressly left open the question of whether its analysis would differ when examining a statute that provided for a bifurcated trial. *United States v. Jackson*, 390 U.S. at 573, 88 S.Ct. at 1211, 20 L.Ed.2d at 142.

These differences between the two statutes alone eliminate *Jackson* as useful precedent in light of this Court's decisions after *Jackson* and before the enactment of New York's death penalty statute. Four years after its decision in Jackson, the Supreme Court decided *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in which the Court declared unconstitutional a non-bifurcated death penalty statute that did not channel the jury's sentencing discretion on the ground that the statute resulted in the "wanton and freakish" imposition of the death penalty. *Furman v. Georgia*, 408 U.S. at 312, 92 S.Ct. at 2763, 33 L.Ed.2d at 390. Then, four years later, when this Court reviewed the newly-enacted Georgia death penalty statute that was passed in response to *Furman*, it found the death penalty statute—which mandated a bifurcated proceeding and enumerated ten aggravating factors that the jury was to consider at the penalty phase—constitutional. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). Before the death penalty could even be considered, the jury had to find that the prosecution had proven at least one aggravating factor beyond a reasonable doubt and, even then, the jury could exercise leniency and decline to impose a death sentence regardless of whether or not mitigation

evidence was presented. *Gregg v. Georgia*, 428 U.S. at 164-165, 96 S.Ct. at 2920-2922, 49 L.Ed.2d at 869-870. Bifurcation and channeled sentencing discretion were crucial to creating a constitutional death penalty scheme —components that were not present in death penalty provisions of the Federal Kidnaping Act. In holding that this Court's *Jackson* decision required the New York Court of Appeals to invalidate the plea provisions of New York's death penalty statute, therefore, the New York high court erred. This Court has never applied the *Jackson* rationale to such a scheme.

In addition to denying a defendant a bifurcated capital trial and giving the sentencer unbridled discretion, the Federal Kidnaping Act condemned in *Jackson* permitted a defendant to avoid the death penalty, regardless of the prosecutor's intentions, if he consented to a bench trial or offered to plead guilty, thus waiving his right to a jury trial. *See United States v. Jackson*, 390 U.S. at 571, 88 S.Ct. at 1210, 138 L.Ed.2d at 141. New York's statute, by contrast and in conformity with the State's constitutional prohibition of jury trial waivers in capital cases (N.Y. Const. Art I, § 2), makes no such allowance. Rather, under the New York statute, a defendant against whom the prosecutor seeks the death penalty must proceed to a jury trial. N.Y.C.P.L. § 220.10(5)(e). Thus, the New York statute, unlike the statute at issue in *Jackson*, not only protects a capital defendant's right to a jury trial, but actually mandates that he exercise that right. Accordingly, the New York death penalty scheme does not contain provisions that "needlessly encourage" guilty pleas or "needlessly penalize" defendants who proceed to trial. The statute, therefore, does not implicate the concerns present in *Jackson*.

Further distinguishing New York's death penalty scheme from that presented to this Court in *Jackson* is

the fact that, in New York, every defendant facing a capital charge is entitled to two capital-certified counsel who have the ability, through generous funding, to conduct extensive guilt-phase and penalty-phase investigations designed to uncover evidence to assist with the defense of the charges as well as the penalty. These counsel are thus enabled to guide a defendant facing the death penalty through the plea negotiation process as well as adequately and accurately inform capital defendants of the lengthy post-conviction review process that would inevitably follow any possible death sentence. These benefits, which are not constitutionally mandated, severely undermine the argument that a comprehensive death penalty scheme such as New York's has the effect of "needlessly encouraging" guilty pleas. Additional assurance that capital defendants in New York will not be "needlessly encouraged" to waive their trial rights and plead guilty is derived from the fact that, under New York's scheme, the death penalty is prohibited in cases in which a defendant is under eighteen years of age or is mentally retarded.

In light of all of these important differences between the statute analyzed in *Jackson* and New York's death penalty statute, the New York Court of Appeals wrongly concluded that the plea provisions enacted as part of the comprehensive and protective scheme violated a defendant's Fifth and Sixth Amendment rights and erroneously extended the rationale of *Jackson* to a statute to which it is inapplicable. Accordingly, this Court should grant the writ for a petition for *certiorari* so that it may decide the issue explicitly left open in *Jackson*—whether the rationale of *Jackson* should extend to modern, bifurcated death-penalty scheme such as New York's.

C. This Court's Post-*Jackson* Plea Bargaining Decisions Have Undermined the Rationale of *Jackson* Such That It Has Been Implicitly Overruled.

Even if this Court finds that the differences between New York's statute and the Federal Kidnaping Act declared unconstitutional in *United States v. Jackson* are not constitutionally significant, it should nevertheless grant the petition for a writ of *certiorari*—as urged by both the Monroe County District Attorney and the New York State Attorney General—to make explicit what is implicit in this Court's post-*Jackson* plea-bargaining cases—that *Jackson* has not stood the test of time and should be overruled. Moreover, this case would provide this Court with the opportunity to reconcile a "split" between the New York and Arkansas state high courts' resolutions of this issue.

In *Jackson*, this Court invalidated that portion of the Federal Kidnaping Act (18 U.S.C. § 1201[a]) that provided for different maximum penalties for those defendants who were convicted after a jury trial and those who were convicted after a guilty plea or bench trial. Those convicted after a jury verdict of guilty automatically faced the death penalty and could receive that sentence if a jury, with unbridled discretion, so recommended. In contrast, a defendant who pleaded guilty or chose to be tried by a Judge instead of a jury could not receive a death sentence. 390 U.S. at 570-71, 88 S.Ct. at 1210-1211, 20 L.Ed.2d at 141.

This Court held that the statute was unconstitutional because its "inevitable effect" was to "discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial." 390 U.S. at 581-583, 88 S.Ct. at 1216-1217, 20 L.Ed.2d at 146-148. This statutorily prescribed scheme that permitted "trading" the right to a

jury trial for a guaranteed reduced sentence was impermissible, the Court held, because it placed a burden on the exercise of constitutional rights. The "evil" in the Federal Kidnaping scheme was "not that it necessarily coerce[d] guilty pleas and jury waivers but simply that it needlessly encourage[d] them." 390 U.S. at 583, 88 S.Ct. at 1217, 20 L.Ed.2d at 148. The inducement to waive the right to a jury trial and plead guilty, in other words, was simply too great to resist.

But almost as soon as the ink was dry on the *Jackson* decision, the evolution of this Court's plea-bargaining jurisprudence slowly chipped away at *Jackson*'s rationale. Indeed, since *Jackson*, this Court has not only acknowledged the reality of plea bargaining in the criminal justice system, but has explicitly endorsed the constitutional soundness, necessity, and benefits of plea bargaining to the administration of criminal justice.

For example, in *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), in which the Court examined the legality of a guilty plea taken pursuant to the very statutory scheme that it declared unconstitutional in *Jackson*, the Court refused to vacate the defendant's voluntary and knowing guilty plea. The Court acknowledged that guilty pleas are not constitutionally forbidden and can be mutually advantageous to the State and a defendant in that they provide the hope or the assurance of a lesser penalty than would be imposed upon conviction after trial. *Brady v. United States*, 397 U.S. at 752, 90 S.Ct. at 1471, 25 L.Ed.2d at 758.

Next, only three years after *Jackson*, the Supreme Court dispelled any "lingering doubts about the legitimacy of the practice", *Blackledge v. Allision*, 431 U.S. 63, 76, 97 S.Ct. 1621, 1630, 52 L.Ed.2d 136, 148 (1977), of plea bargaining in *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). The *Santo-*

bello Court declared that plea bargaining was a "highly desirable" and "essential component of the administration of justice", which, "[p]roperly administered, is to be encouraged." 404 U.S. at 260-261, 92 S.Ct. at 498, 30 L.Ed.2d at 432.[2] Indeed, *Santobello*'s "open acknowledgement of th[e] previously clandestine practice" of plea bargaining was later described as a fundamental change from *Jackson*. *See Bordenkircher v. Hayes*, 434 U.S. 357, 361-362, 98 S.Ct. 663, 667, 54 L.Ed.2d 604, 609-610 (1978).

This Court's decision in *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L. Ed.2d 714 (1973) further eroded *Jackson*'s foundation. In *Chaffin*, the defendant had been convicted and sentenced for robbery by a jury. After being granted a new trial at which the jury imposed a harsher sentence, defendant argued that the possibility of a lengthier sentence upon reconviction impermissibly chilled the exercise of his right to demand a jury trial for his retrial. In affirming the defendant's conviction, this Court, citing *Brady v. United States*, warned that *Jackson* did not hold that the Constitution "forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights." *Chaffin v. Stynchcombe*, 412 U.S. at 30, 93 S.Ct. at 1984, 36 L.Ed.2d at 725. Rather, in stark contrast to the language in *Jackson*, the Court acknowledged that, inherent in a plea offer is some benefit to the defendant that would discourage him from exercising his right to a trial. And, the Court noted that the discouraging effect was inherent in a system in

---

[2] This Court reaffirmed the importance of plea bargaining to the criminal justice system only last week in *United States v. Dominguez Benitez*, 542 U.S. __, __ S.Ct. __, __ L.Ed.2d __, Slip op. at 8 (June 14, 2004), when it declared that guilty pleas "are indispensable in the operation of the modern criminal justice system." (citation omitted).

which plea bargains were tolerated and encouraged. *Chaffin v. Stynchcombe*, 412 U.S. at 31, 93 S.Ct. at 1985, 36 L.Ed.2d at 726. The Constitution, the Court concluded, is not violated by such a system.

Bordenkircher v. Hayes, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978), further undermined *Jackson*'s central premise. In that case, during plea negotiations with the defendant, the prosecutor promised to recommend less than the maximum sentence if the defendant pleaded guilty to the indictment, but stated that, if the defendant did not plead guilty and save the court "the inconvenience and necessity of a trial", he would reindict the defendant as a habitual offender, thus subjecting the defendant to a mandatory life sentence upon conviction. *Bordenkircher v. Hayes*, 434 U.S. at 358, 98 S.Ct. at 665, 54 L.Ed.2d at 607. Defendant rejected the plea offer and was subsequently charged, convicted, and sentenced to a mandatory life sentence pursuant to the state's habitual offender act. 434 U.S. at 359, 98 S.Ct. at 665-666, 54 L.Ed.2d at 608. In upholding the defendant's conviction, the Court wrote that, though the risk of more severe punishment if he goes to trial "may have a 'discouraging effect on the defendant's assertion of his trial rights,' " this effect was simply a natural consequence of plea bargaining and was not constitutionally impermissible. 434 U.S. at 364, 98 S.Ct. at 668, 54 L.Ed.2d at 611 (quoting *Chaffin v. Stynchcombe*, 412 U.S. at 31, 93 S.Ct. at 1985, 36 L.Ed.2d at 726). This holding was reaffirmed in *United States v. Goodwin*, 457 U.S. 368, 378, 102 S.Ct. 2485, 2491, 73 L.Ed.2d 74, 84 (1982), when the Court explained that "[t]he outcome in *Bordenkircher*, was mandated by this Court's acceptance of plea negotiation as a legitimate process."

Corbitt v. New Jersey, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) should have dealt the final blow to

Jackson's crumbling rationale. The *Corbitt* majority extended the rationale of *Bordenkircher v. Hayes* to uphold a sentencing scheme that, in a non-capital context, resembled the statutory scheme presented in *Jackson*. Specifically, the New Jersey statute, like the Federal Kidnaping Act, provided for a lesser maximum punishment for defendants convicted after a *non vult* or a *nolo contendere* plea than the maximum punishment permitted for a defendant convicted after a trial. *Corbitt v. New Jersey*, 439 U.S. at 216-217, 99 S.Ct. at 496, 58 L.Ed.2d at 472-473. In rejecting the defendant's *Jackson* claim, the Court distinguished the New Jersey statute from the Federal Kidnaping Act by noting that the New Jersey statute did not provide for the possibility of a death sentence. *Corbitt v. New Jersey*, 439 U.S. at 217, 99 S.Ct. at 496, 58 L.Ed.2d at 473. Rather, the Court decided, the conclusion that inevitably followed from the Court's decisions in *Brady v. United States*, *Chaffin v. Stynchcombe*, and *Bordenkircher v. Hayes*, was that the mere fact that a guilty plea provision might encourage a defendant to plead guilty and, as a necessary corollary, discourage him from exercising his right to a trial, did not render the scheme unconstitutional:

> While confronting a defendant with the risk of a more severe punishment clearly may have a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices is an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas. It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

439 U.S. at 220-221, 99 S.Ct. at 498, 58 L.Ed.2d at 475 (internal citations, quotes, and brackets omitted).

The fact that the difference in the maximum punishments to which a defendant would be subjected was statutorily prescribed rather than the result of the plea-bargaining process was immaterial. The Court refused to prohibit a state legislature from providing for the possibility of leniency in return for a guilty plea while allowing a prosecutor to do the same through his or her charging decisions. *Corbitt v. New Jersey*, 439 U.S. at 224, 99 S.Ct. at 500, 58 L.Ed.2d at 477. This logical and necessary extension of *Brady*, *Chaffin*, and *Bordenkircher* prompted the dissenting Justices in *Corbitt* to lament that "[t]he holding in *Jackson*, though not specifically overruled, has been divorced from the rationale on which it rested." *Corbitt v. New Jersey*, 439 U.S. at 229, 99 S.Ct. at 503, 58 L.Ed.2d at 480-481.

The plea provisions of New York's death penalty statute create precisely the same situation as the statute sanctioned in *Corbitt*—leniency for a defendant who pleads guilty. This structure is consistent with this Court's post-*Jackson* decisions and should no longer be constitutionally prohibited simply because the death penalty is involved.

Moreover, granting a petition for a writ of *certiorari* in this case would give this Court the opportunity to resolve the "split" between the New York and Arkansas state high courts' treatment of the *Jackson* issue. The Arkansas high court, upon analyzing a statute with plea provisions that are virtually identical to New York's, rejected a *Jackson* claim, noting that "the holding of *Jackson* has been eroded in recent decisions." *Ruiz & Denton v. State*, 275 Ark. 410, 413, 630 S.W.2d 44, 46, *cert. denied*, 459 U.S. 882, 103 S.Ct. 181, 74 L.Ed.2d

148 (1982).[3] The New York high court, in contrast, determined that *Jackson* was still binding precedent.

In light of this Court's plea bargaining jurisprudence subsequent to 1968, *Jackson* is an anomaly. Accordingly, this Court should grant the writ for a petition for *certiorari* so that it may make explicit what has been implicit in this Court's post-*Jackson* decisions—that *Jackson* has not stood the test of time and should be overruled.

D. Other decisions from this Court Suggest That *Jackson*'s Precedential Value Has Been So Diminished That It Is No Longer Good Law.

Not only has this Court's plea-bargaining jurisprudence wholly undermined the rationale of *Jackson*, but this Court's decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), examined in conjunction with the numerous decisions from this Court that analyze capital and non-capital cases under the same legal standard, has continued this Court's shift away from the philosophical underpinnings of *Jackson*. Accordingly, *Corbitt v. New Jersey* and *United States v. Jackson* are irreconcilable, and this Court should grant the petition for *certiorari* to explicitly declare the same.

This Court's decision in *Jackson* can be viewed as the result of this Court's then-prevailing view that the possibility of capital punishment required utilizing different, more stringent standards for reviewing capital cases. Since *Jackson*, however, this Court has, in a variety of contexts, acknowledged that, though death may be "dif-

---

[3] The United States Court of Appeals for the Eighth Circuit, reviewing the state conviction of an Arkansas death-row inmate, also rejected a *Jackson* claim. *Pickens v. Lockhart*, 714 F.2d 1455 (8th Cir. 1983).

ferent" (*see Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 [1978]), it is not so different that otherwise analogous claims should be subject to different standards of review simply because one claim may arise from a death penalty case. *See, e.g., Boyde v. California*, 494 U.S. 370, 376, 110 S.Ct. 1190, 1195, 108 L.Ed.2d 316, 326 (1990) (same standard for reviewing jury instructions in capital and non-capital cases); *Smith v. Murray*, 477 U.S. 527, 538-539, 106 S.Ct. 2661, 2668-2669, 91 L.Ed.2d 434, 447 (1986) (principles governing habeas review do not differ depending upon the nature of the penalty the State imposes for a crime); *Strickland v. Washington*, 466 U.S. 668, 686-687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984) (same standard for ineffective assistance of counsel claims in capital and non-capital cases); *see also Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711 (1967) (same harmless error standard on direct review for capital and non-capital defendants).

Indeed, in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), this Court rejected a capital defendant's claim that the death penalty presents such a unique situation that he should have a lesser burden of proving discriminatory prosecution than non-capital defendants have. Rather, this Court acknowledged that the criminal justice system is a unitary system and, therefore, there is no reason to ignore well settled presumptions underlying that system simply because a defendant faces execution. *McCleskey v. Kemp*, 481 U.S. at 313, 107 S.Ct. at 1778, 95 L.Ed.2d at 292.

And in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), this Court overruled *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990) as inconsistent with *Apprendi v. New Jersey*, 530

U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because, to do otherwise, would leave in place a system in which the means for finding a fact upon which the legislature conditioned an **increase** in the maximum punishment for capital and non-capital defendants were different. Analagously, this Court should overrule *Jackson* as inconsistent with *Corbitt v. New Jersey* because, to do otherwise, would leave in place a system in which the means for obtaining a **decrease** in the maximum punishment for capital and non-capital defendants is different: a legislature may statutorily permit a non-capital defendant to ensure a decreased maximum sentence if he agrees to plead guilty, but may not permit a capital defendant to do the same.

This different standard has led to an "ironic twist", anticipated by the New York Court of Appeals in its decision in *Matter of Hynes v. Tomei, Matter of Relin v. Connell*, that the application of *Jackson* to New York's statute has "reduce[d] the flexibility of both prosecutors and defendants who wish to plea bargain in capital cases." 92 N.Y.2d at 629, 684 N.Y.S.2d at 185, 706 N.E.2d at 1209.

The effect of *Jackson* on New York's death penalty scheme is, accordingly, not limited, as respondent would have it, to at most four other defendants in New York. Rather, continued application of *Jackson* will impact every future New York defendant charged with a capital crime, states with untested statutory capital plea provisions similar to New York's, and every State that might seek to implement a statutory death penalty scheme similar to New York's.

Jackson, and only *Jackson*, was the basis for the New York Court of Appeals' decision to abandon the carefully considered State Legislature's rules governing guilty pleas in capital cases, resulting in unnecessary

constraints being placed upon a capital defendant's ability to negotiate an advantageous plea bargain. A rationale that has the effect of reducing the ability of defendants who face the most severe punishment to plea bargain is irreconcilable with this Court's post-*Jackson* determination to analyze capital and non-capital claims alike as well as with this Court's recognition that a system that precludes opportunities to dispense mercy "would be totally alien to our notions of criminal justice." *Gregg v. Georgia*, 428 U.S. at 199, 96 S.Ct. at 2937, 49 L.Ed.2d at 889.

Because the holding in *Jackson* is premised upon the now-abandoned notion that death penalty claims should be analyzed under different standards than claims raised in non-capital cases, this Court should grant the petition for *certiorari* to explicitly overrule this remnant from *Jackson*.

CONCLUSION

For all of the reasons explained above, this Court should grant the petition for a writ of *certiorari* to review the decision and judgment of the New York Court of Appeals.

Respectfully submitted,

MICHAEL A. ARCURI
District Attorney
Oneida County,
New York and President,
New York State District
Attorneys Association
107 Columbia Street
Albany, New York 12210
(518) 432-1100

APPENDIX

STATE OF NEW YORK

S. 2850 A. 4843

1995-1996 Regular Sessions

SENATE – ASSEMBLY

March 2, 1995

IN SENATE—Introduced by Sens. VOLKER, BRUNO, PADAVAN, SALAND, NOZZOLIO, COOK, DEFRANCISCO, DICARLO, FARLEY, GOODMAN, HOBLOCK, HOFFMANN, HOLLAND, JOHNSON, KUEL, LARKIN, LAVALLE, LEIBELL, LEVY, LIBOUS, MALTESE, ONORATO, PRESENT, RATH, SEARS, SEWARD, SKELOS, SPANO, STACHOWSKI, STAFFORD, TRUNZO, TULLY, VELELLA, WRIGHT,—(at request of the Governor)—read twice and ordered printed, and when printed to be committed to the Committee on Codes

IN ASSEMBLY—Introduced by M. of A. VITALIANO, ROBACH, KAUFMAN, TOKASZ, HIKIND, KLEIN—Multi-Sponsored by—M. of A. ABBATE, COLMAN, CONNELLY, CROWLEY, DESTITO, GROMACK, KEANE, MAGEE, PORDUM, SEMINERIO, TOCCI, WEISENBERG—(at request of the Governor)—read once and referred to the Committee on Codes

AN ACT to amend the penal law, the criminal procedure law, the judiciary law, the county law, the correction law and the executive law, in relation to imposition of the death penalty in certain additional instances and establishing a procedure therefor and to the assignment of counsel and related services in criminal actions in which a death sentence may be imposed and

repealing subdivision 3 of section 112 and article 22-B of the correction law relating to imposition of such penalty

---

EXPLANATION—Matter in italics (underscored) is new; matter in brackets [ ] is old law to be omitted.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 2 of section 60.05 of the penal law, as amended by chapter 410 of the laws of 1979, is amended to read as follows:

2. Class A felony. Except as provided in subdivisions three and four of section 70.06 of this chapter, every person convicted of a class A felony must be sentenced to imprisonment in accordance with section 70.00, unless such person is convicted of either murder in the first degree and is sentenced [to death] in accordance with section 60.06 or of a class A-II felony and is sentenced to probation in accordance with section 65.00.

§ 2. Section 60.06 of the penal law, as added by chapter 367 of the laws of 1974, is amended to read as follows:

§ 60.06 Authorized disposition; murder in the first degree.

When a person is convicted of murder in the first degree as defined in section 125.27 *of this chapter*, the court shall, *in accordance with the provisions of section 400.27 of the criminal procedure law,* sentence the defendant to death, *to life imprisonment without parole*

in accordance with subdivision five of section 70.00 of this chapter or to a term of imprisonment for a class A-I felony other than a sentence of life imprisonment without parole, in accordance with subdivisions one through three of section 70.00 of this chapter.

§ 3. Subdivision 1 of section 70.00 of the penal law, as amended by chapter 277 of the laws of 1973, is amended to read as follows:

1. Indeterminate sentence. Except as provided in [subdivision] *subdivisions* four *and five*, a sentence of imprisonment for a felony shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

§ 4. Subparagraph (i) of paragraph (a) of subdivision 3 of section 70.00 of the penal law, as amended by chapter 276 of the laws of 1973, is amended to read as follows:

(i) For a class A-I felony, such minimum period shall not be less than fifteen years nor more than twenty-five years*; provided that where a sentence, other than a sentence of death or life imprisonment without parole, is imposed upon a defendant convicted of murder in the first degree as defined in section 125.27 of this chapter such minimum period shall be not less than twenty years nor more than twenty-five years.*

§ 5. Section 70.00 of the penal law is amended by adding a new subdivision 5 to read as follows:

5. Life imprisonment without parole. Notwithstanding any other provision of law, a defendant sentenced to life

imprisonment without parole shall not be or become eligible for parole or conditional release. For purposes of commitment and custody, other than parole and conditional release, such sentence shall be deemed to be an indeterminate sentence. A defendant may be sentenced to life imprisonment without parole only upon conviction for the crime of murder in the first degree as defined in section 125.27 of this chapter and in accordance with the procedures provided by law for imposing a sentence for such crime.

§ 6. Section 70.20 of the penal law is amended by adding a new subdivision 2-a to read as follows:

2-a. Sentence of life imprisonment without parole. When a sentence of life imprisonment without parole is imposed, the court shall commit the defendant to the custody of the state department of correctional services for the remainder of the life of the defendant.

§ 7. Subdivision 1 of section 125.27 of the penal law, as added by chapter 367 of the laws of 1974, is amended to read as follows:

1. With intent to cause the death of another person, he causes the death of such person *or of a third person*; and

(a) Either:

(i) the *intended* victim was a police officer as defined in subdivision 34 of section 1.20 of the criminal procedure law who was [killed] *at the time of the killing engaged* in the course of performing his official duties, and the defendant knew or reasonably should have known that the *intended* victim was a police officer; or

(ii) *the intended victim was a peace officer as defined in paragraph a of subdivision twenty-one, subdivision twenty-three, twenty-four or sixty-two (employees of the*

division for youth) of section 2.10 of the criminal procedure law who was at the time of the killing engaged in the course of performing his official duties, and the defendant knew or reasonably should have known that the intended victim was such a uniformed court officer, parole officer, probation officer, or employee of the division for youth; or

(iii) the *intended* victim was an employee of a state correctional institution or was an employee of a local correctional facility as defined in subdivision two of section forty of the correction law, who was [killed] *at the time of the killing engaged* in the course of performing his official duties, and the defendant knew or reasonably should have known that the *intended* victim was an employee of a state correctional institution or a local correctional facility; or

[(iii)] *(iv)* at the time of the commission of the [crime] *killing*, the defendant was confined in a state correctional institution[,] or was otherwise in custody upon a sentence for the term of his natural life, or upon a sentence commuted to one of natural life, or upon a sentence for an indeterminate term the minimum of which was at least fifteen years and the maximum of which was natural life, or at the time of the commission of the [crime] *killing*, the defendant had escaped from such confinement or custody *while serving such a sentence* and had not yet been returned to such confinement or custody; [and] *or*

(v) the intended victim was a witness to a crime committed on a prior occasion and the death was caused for the purpose of preventing the intended victim's testimony in any criminal action or proceeding whether or not such action or proceeding had been commenced, or the intended victim had previously testified in a criminal

action or proceeding and the killing was committed for the purpose of exacting retribution for such prior testimony, or the intended victim was an immediate family member of a witness to a crime committed on a prior occasion and the killing was committed for the purpose of preventing or influencing the testimony of such witness, or the intended victim was an immediate family member of a witness who had previously testified in a criminal action or proceeding and the killing was committed for the purpose of exacting retribution upon such witness for such prior testimony. As used in this subparagraph "immediate family member" means a husband, wife, father, mother, daughter, son, brother, sister, stepparent, grandparent, stepchild or grandchild; or

(vi) the defendant committed the killing or procured commission of the killing pursuant to an agreement with a person other than the intended victim to commit the same for the receipt, or in expectation of the receipt, of anything of pecuniary value from a party to the agreement or from a person other than the intended victim acting at the direction of a party to such agreement; or

(vii) the victim was killed while the defendant was in the course of committing or attempting to commit and in furtherance of robbery, burglary in the first degree or second degree, kidnapping in the first degree, arson in the first degree or second degree, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, aggravated sexual abuse in the first degree or escape in the first degree, or in the course of and furtherance of immediate flight after committing or attempting to commit any such crime or in the course of and furtherance of immediate flight after attempting to commit the crime of murder in the second degree; provided however, the victim is not a participant in one of

the aforementioned crimes and, provided further that, unless the defendant's criminal liability under this subparagraph is based upon the defendant having commanded another person to cause the death of the victim or intended victim pursuant to section 20.00 of this chapter, this subparagraph shall not apply where the defendant's criminal liability is based upon the conduct of another pursuant to section 20.00 of this chapter; or

(viii) as part of the same criminal transaction, the defendant, with intent to cause serious physical injury to or the death of an additional person or persons, causes the death of an additional person or persons; provided, however, the victim is not a participant in the criminal transaction; or

(ix) prior to committing the killing, the defendant had been convicted of murder as defined in this section or section 125.25 of this article, or had been convicted in another jurisdiction of an offense which, if committed in this state, would constitute a violation of either of such sections; or

(x) the defendant acted in an especially cruel and wanton manner pursuant to a course of conduct intended to inflict and inflicting torture upon the victim prior to the victim's death. As used in this subparagraph, "torture" means the intentional and depraved infliction of extreme physical pain; "depraved" means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain; or

(xi) the defendant intentionally caused the death of two or more additional persons within the state in separate criminal transactions within a period of twenty-

four months when committed in a similar fashion or pursuant to a common scheme or plan; or

(xii) the intended victim was a judge as defined in subdivision twenty-three of section 1.20 of the criminal procedure law and the defendant killed such victim because such victim was, at the time of the killing, a judge; and

(b) The defendant was more than eighteen years old at the time of the commission of the crime.

§ 8. Paragraph (b) of subdivision 3 of section 200.60 of the criminal procedure law is amended to read as follows:

(b) If the defendant denies the previous conviction or remains mute, the people may prove that element of the offense charged before the jury as a part of their case. *In any prosecution under subparagraph (ix) of paragraph (a) of subdivision one of section 125.27 of the penal law, if the defendant denies the previous murder conviction or remains mute, the people may prove that element of the offense only after the jury has first found the defendant guilty of intentionally causing the death of a person as charged in the indictment, in which case the court shall then permit the people and the defendant to offer evidence and argument consistent with the relevant provisions of section 260.30 of this chapter with respect to the previous murder conviction.*

§ 9. Subdivision 6 of section 210.20 of the criminal procedure law, as added by chapter 209 of the laws of 1990, is amended to read as follows:

6. The effectiveness of an order reducing a count or counts of an indictment or dismissing an indictment and directing the filing of a prosecutor's information *or dismissing a count or counts of an indictment charging*

murder in the first degree shall be stayed for thirty days following the entry of such order unless such stay is otherwise waived by the people. On or before the conclusion of such thirty-day period, the people shall exercise one of the following options:

(a) Accept the court's order by filing a reduced indictment [or], by dismissing the indictment and filing a prosecutor's information, *or by filing an indictment containing any count or counts remaining after dismissal of the count or counts charging murder in the first degree,* as appropriate;

(b) Resubmit the subject count or counts to the same or a different grand jury within thirty days of the entry of the order or such additional time as the court may permit upon a showing of good cause; provided, however, that if in such case an order is again entered with respect to such count or counts pursuant to subdivision one-a of this section, such count or counts may not again be submitted to a grand jury. Where the people exercise this option, the effectiveness of the order further shall be stayed pending a determination by the grand jury and the filing of a new indictment, if voted, charging the resubmitted count or counts;

(c) Appeal the order pursuant to subdivision *one or* one-a of section 450.20. Where the people exercise this option, the effectiveness of the order further shall be stayed in accordance with the provisions of subdivision two of section 460.40.

§ 10. Paragraph (e) of subdivision 5 of section 220.10 of the criminal procedure law, as amended by chapter 410 of the laws of 1979, is amended to read as follows:

(e) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section

125.27 of the penal law*; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.*

§ 11. Subparagraph (vii) of paragraph (b) of subdivision 3 of section 220.30 of the criminal procedure law, as added by chapter 367 of the laws of 1974 and as renumbered by chapter 233 of the laws of 1980, is amended to read as follows:

(vii) A defendant may not enter a plea of guilty to the crime of murder in the first degree as defined in section 125.27 of the penal law*; provided, however, that a defendant may enter such a plea with both the permission of the court and the consent of the people when the agreed upon sentence is either life imprisonment without parole or a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.*

§ 12. Subdivision 2 of section 220.60 of the criminal procedure law, as amended by chapter 548 of the laws of 1980, is amended to read as follows:

2. A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter: (a) a plea of guilty to part of the indictment pursuant to subdivision *three or* four but subject to the limitation in subdivision five of section 220.10, or (b) a plea of not responsible by reason of mental disease or defect to the indictment pursuant to section 220.15 of this chapter.

§ 13. The criminal procedure law is amended by adding a new section 250.40 to read as follows:

§ 250.40 Notice of intent to seek death penalty.

1. A sentence of death may not be imposed upon a defendant convicted of murder in the first degree unless, pursuant to subdivision two of this section, the people file with the court and serve upon the defendant a notice of intent to seek the death penalty.

2. In any prosecution in which the people seek a sentence of death, the people shall, within one hundred twenty days of the defendant's arraignment upon an indictment charging the defendant with murder in the first degree, serve upon the defendant and file with the court in which the indictment is pending a written notice of intention to seek the death penalty. For good cause shown the court may extend the period for service and filing of the notice.

3. Notwithstanding any other provisions of law, where the people file a notice of intent to seek the death penalty pursuant to this section the defendant shall be entitled to an additional sixty days for the purpose of filing new motions or supplementing pending motions.

4. A notice of intent to seek the death penalty may be withdrawn at any time by a written notice of withdrawal filed with the court and served upon the defendant. Once withdrawn the notice of intent to seek the death penalty may not be refiled.

§ 14. The criminal procedure law is amended by adding a new section 270.16 to read as follows:

§ 270.16 Capital cases; individual questioning for racial bias.

1. In any case in which the crime charged may be punishable by death, the court shall, upon motion of either party, permit the parties, commencing with the people, to examine the prospective jurors individually and outside the presence of the other prospective jurors regarding their qualifications to serve as jurors. Each party shall be afforded a fair opportunity to question a prospective juror as to any unexplored matter affecting his or her qualifications, including without limitation the possibility of racial bias on the part of the prospective juror, but the court shall not permit questioning that is repetitious or irrelevant, or questions as to a prospective juror's knowledge of rules of law. If necessary to prevent improper questioning as to any matter, the court shall personally examine the prospective jurors as to that matter. The scope of such examination shall be within the discretion of the court. After the parties have concluded their examinations of a prospective juror, the court may ask such further questions as it deems proper regarding the qualifications of the prospective juror.

2. The proceedings provided for in this section shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed.

§ 15. Paragraph (f) of subdivision 1 of section 270.20 of the criminal procedure law, as amended by chapter 367 of the laws of 1974, is amended to read as follows:

(f) [There is a possibility that the] *The* crime charged [is] *may be* punishable by death and the prospective juror entertains such conscientious opinions either against or in favor of [the death penalty] *such punishment* as to preclude [him] *such juror* from rendering an impartial verdict *or from properly exercising the dis-*

cretion conferred upon such juror by law in the determination of a sentence pursuant to section 400.27.

§ 16. Section 270.30 of the criminal procedure law, as amended by chapter 100 of the laws of 1992, is amended to read as follows:

§ 270.30 Trial jury; alternate jurors.

1. Immediately after the last trial juror is sworn, the court may in its discretion direct the selection of one or more, but not more than six additional jurors to be known as "alternate jurors", *except that, in a prosecution under section 125.27 of the penal law, the court may, in its discretion, direct the selection of as many alternate jurors as the court determines to be appropriate.* Alternate jurors must be drawn in the same manner, must have the same qualifications, must be subject to the same examination and challenges for cause and must take the same oath as the regular jurors. After the jury has retired to deliberate, the court must either (1) with the consent of the defendant and the people, discharge the alternate jurors or (2) direct the alternate jurors not to discuss the case and must further direct that they be kept separate and apart from the regular jurors.

2. In any prosecution in which the people seek a sentence of death, the court shall not discharge the alternate jurors when the jury retires to deliberate upon its verdict and the alternate jurors, in the discretion of the court, may be continuously kept together under the supervision of an appropriate public servant or servants until such time as the jury returns its verdict. If the jury returns a verdict of guilty to a charge for which the death penalty may be imposed, the alternate jurors shall not be discharged and shall remain available for service

during any separate sentencing proceeding which may be conducted pursuant to section 400.27.

§ 17. The criminal procedure law is amended by adding a new section 270.55 to read as follows:

§ 270.55 Sentencing jury in capital cases.

During the period extending from when a jury returns a verdict of guilty upon a count of an indictment charging murder in the first degree as defined by section 125.27 of the penal law until a jury retires to deliberate on the sentence pursuant to section 400.27, the court may in its discretion either permit the jurors to separate during recesses and adjournments or direct that they be continuously kept together during such periods under the supervision of an appropriate public servant or servants. In the latter case, such public servant or servants may not speak to or communicate with any juror concerning any subject connected with the sentencing proceeding nor permit any other person to do so, and must return the jury to the court room at the next designated session. Unless otherwise provided for in section 400.27, the provisions of sections 270.35, 270.40 and 270.50 shall govern the sentencing proceeding provided for in section 400.27.

§ 18. The opening paragraph of subdivision 3 of section 300.40 of the criminal procedure law is amended to read as follows:

If a multiple count indictment contains concurrent counts *of murder in the first degree, the court must submit every such count. In any other case, if a multiple count indictment contains concurrent counts* only, the court must submit at least one such count, and may submit more than one as follows:

§ 19. Section 310.80 of the criminal procedure law is amended to read as follows:

§ 310.80 Recording and checking of verdict and polling of jury.

After a verdict has been rendered, it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their verdict. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If upon either the collective or the separate inquiry any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case, except as otherwise provided in [sections 125.30 and 125.35 of the penal law] *section 400.27.*

§ 20. The criminal procedure law is amended by adding a new section 400.27 to read as follows:

§ 400.27 Procedure for determining sentence upon conviction for the offense of murder in the first degree.

1. Upon the conviction of a defendant for the offense of murder in the first degree as defined by section 125.27 of the penal law, the court shall promptly conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or to life imprisonment without parole pursuant to subdivision five of section 70.00 of the penal law. Nothing in this section shall be deemed to preclude the people at any time from determining that the death penalty shall not be sought in a particular case, in which case the separate sentencing proceeding shall not be conducted and the court may

sentence such defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

2. The separate sentencing proceeding provided for by this section shall be conducted before the court sitting with the jury that found the defendant guilty. The court may discharge the jury and impanel another jury only in extraordinary circumstances and upon a showing of good cause, which may include, but is not limited to, a finding of prejudice to either party. If a new jury is impaneled, it shall be formed in accordance with the procedures in article two hundred seventy of this chapter. Before proceeding with the jury that found the defendant guilty, the court shall determine whether any juror has a state of mind that is likely to preclude the juror from rendering an impartial decision based upon the evidence adduced during the proceeding. In making such determination the court shall personally examine each juror individually outside the presence of the other jurors. The scope of the examination shall be within the discretion of the court and may include questions supplied by the parties as the court deems proper. The proceedings provided for in this subdivision shall be conducted on the record; provided, however, that upon motion of either party, and for good cause shown, the court may direct that all or a portion of the record of such proceedings be sealed. In the event the court determines that a juror has such a state of mind, the court shall discharge the juror and replace the juror with the alternate juror whose name was first drawn and called. If no alternate juror is available, the court must discharge the jury and impanel another jury in accordance with article two hundred seventy of this chapter.

3. For the purposes of a proceeding under this section each subparagraph of paragraph (a) of subdivision one of section 125.27 of the penal law shall be deemed to define an aggravating factor. Except as provided in subdivision seven of this section, at a sentencing proceeding pursuant to this section the only aggravating factors that the jury may consider are those proven beyond a reasonable doubt at trial, and no other aggravating factors may be considered. Whether a sentencing proceeding is conducted before the jury that found the defendant guilty or before another jury, the aggravating factor or factors proved at trial shall be deemed established beyond a reasonable doubt at the separate sentencing proceeding and shall not be relitigated. Where the jury is to determine sentences for concurrent counts of murder in the first degree, the aggravating factor included in each count shall be deemed to be an aggravating factor for the purpose of the jury's consideration in determining the sentence to be imposed on each such count.

4. The court on its own motion or on motion of either party, in the interest of justice or to avoid prejudice to either party, may delay the commencement of the separate sentencing proceeding.

5. Notwithstanding the provisions of article three hundred ninety of this chapter, where a defendant is found guilty of murder in the first degree, no presentence investigation shall be conducted; provided, however, that where the court is to impose a sentence of imprisonment, a presentence investigation shall be conducted and a presentence report shall be prepared in accordance with the provisions of such article.

6. At the sentencing proceeding the people shall not relitigate the existence of aggravating factors proved at the trial or otherwise present evidence, except, subject

to the rules governing admission of evidence in the trial of a criminal action, in rebuttal of the defendant's evidence. However, when the sentencing proceeding is conducted before a newly impaneled jury, the people may present evidence to the extent reasonably necessary to inform the jury of the nature and circumstances of the count or counts of murder in the first degree for which the defendant was convicted in sufficient detail to permit the jury to determine the weight to be accorded the aggravating factor or factors established at trial. Whenever the people present such evidence, the court must instruct the jury in its charge that any facts elicited by the people that are not essential to the verdict of guilty on such count or counts shall not be deemed established beyond a reasonable doubt. Subject to the rules governing the admission of evidence in the trial of a criminal action, the defendant may present any evidence relevant to any mitigating factor set forth in subdivision nine of this section; provided, however, the defendant shall not be precluded from the admission of reliable hearsay evidence. The burden of establishing any of the mitigating factors set forth in subdivision nine of this section shall be on the defendant, and must be proven by a preponderance of the evidence. The people shall not offer evidence or argument relating to any mitigating factor except in rebuttal of evidence offered by the defendant.

7. (a) The people may present evidence at the sentencing proceeding, to the extent such evidence could not have been presented by the people at trial, to prove that the crime of murder in the first degree for which the defendant was convicted was committed in furtherance of and after substantial planning and premeditation to commit an act of terrorism. For purposes of this section, "terrorism" means activities that involve a violent act or

acts dangerous to human life that are in violation of the criminal laws of this state and are intended to intimidate or coerce a civilian population, influence the policy of a government by intimidation or coercion, or affect the conduct of a government by murder, assassination or kidnapping. The defendant's commission of the crime of murder in the first degree through an act of terrorism, shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(b) The people may present evidence at the sentencing proceeding to prove that in the ten year period prior to the commission of the crime of murder in the first degree for which the defendant was convicted, the defendant has previously been convicted of two or more offenses committed on different occasions; provided, that each such offense shall be either (i) a class A felony offense other than one defined in article two hundred twenty of the penal law, a class B violent felony offense specified in paragraph (a) of subdivision one of section 70.02 of the penal law, or a felony offense under the penal law a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death, or (ii) an offense under the laws of another state or of the United States punishable by a term of imprisonment of more than one year a necessary element of which involves either the use or attempted use or threatened use of a deadly weapon or the intentional infliction of or the attempted intentional infliction of serious physical injury or death. For the purpose of this paragraph, the term "deadly weapon" shall have the meaning set forth in subdivision twelve of section 10.00 of the penal law. In calculating the ten year period under this paragraph, any period of time during which the defendant was

incarcerated for any reason between the time of commission of any of the prior felony offenses and the time of commission of the crime of murder in the first degree shall be excluded and such ten year period shall be extended by a period or periods equal to the time served under such incarceration. The defendant's conviction of two or more such offenses shall, if proven at the sentencing proceeding, constitute an aggravating factor.

(c) In order to be deemed established, an aggravating factor set forth in this subdivision must be proven by the people beyond a reasonable doubt and the jury must unanimously find such factor to have been so proven. The defendant may present evidence relating to an aggravating factor defined in this subdivision and either party may offer evidence in rebuttal. Any evidence presented by either party relating to such factor shall be subject to the rules governing admission of evidence in the trial of a criminal action.

(d) Whenever the people intend to offer evidence of an aggravating factor set forth in this subdivision, the people must within a reasonable time prior to trial file with the court and serve upon the defendant a notice of intention to offer such evidence. Whenever the people intend to offer evidence of the aggravating factor set forth in paragraph (b) of this subdivision, the people shall file with the notice of intention to offer such evidence a statement setting forth the date and place of each of the alleged offenses in paragraph (b) of this subdivision. The provisions of section 400.15 of this chapter, except for subdivisions one and two thereof, shall be followed.

8. Consistent with the provisions of this section, the people and the defendant shall be given fair opportunity to rebut any evidence received at the separate sentencing proceeding.

9. Mitigating factors shall include the following:

(a) The defendant has no significant history of prior criminal convictions involving the use of violence against another person;

(b) The defendant was mentally retarded at the time of the crime, or the defendant's mental capacity was impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution;

(c) The defendant was under duress or under the domination of another person, although not such duress or domination as to constitute a defense to prosecution;

(d) The defendant was criminally liable for the present offense of murder committed by another, but his participation in the offense was relatively minor although not so minor as to constitute a defense to prosecution;

(e) The murder was committed while the defendant was mentally or emotionally disturbed or under the influence of alcohol or any drug, although not to such an extent as to constitute a defense to prosecution; or

(f) Any other circumstance concerning the crime, the defendant's state of mind or condition at the time of the crime, or the defendant's character, background or record that would be relevant to mitigation or punishment for the crime.

10. At the conclusion of all the evidence, the people and the defendant may present argument in summation for or against the sentence sought by the people. The people may deliver the first summation and the defendant may then deliver the last summation. Thereafter, the court shall deliver a charge to the jury on any matters appropriate in the circumstances. In its charge, the court

must instruct the jury that with respect to each count of murder in the first degree the jury should consider whether or not a sentence of death should be imposed and whether or not a sentence of life imprisonment without parole should be imposed, and that the jury must be unanimous with respect to either sentence. The court must also instruct the jury that in the event the jury fails to reach unanimous agreement with respect to the sentence, the court will sentence the defendant to a term of imprisonment with a minimum term of between twenty and twenty-five years and a maximum term of life. Following the court's charge, the jury shall retire to consider the sentence to be imposed. Unless inconsistent with the provisions of this section, the provisions of sections 310.10, 310.20 and 310.30 shall govern the deliberations of the jury.

11. (a) The jury may not direct imposition of a sentence of death unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established, if any, and unanimously determines that the penalty of death should be imposed. Any member or members of the jury who find a mitigating factor to have been proven by the defendant by a preponderance of the evidence may consider such factor established regardless of the number of jurors who concur that the factor has been established.

(b) If the jury directs imposition of either a sentence of death or life imprisonment without parole, it shall specify on the record those mitigating and aggravating factors considered and those mitigating factors established by the defendant, if any.

(c) With respect to a count or concurrent counts of murder in the first degree, the court may direct the jury

to cease deliberation with respect to the sentence or sentences to be imposed if the jury has deliberated for an extensive period of time without reaching unanimous agreement on the sentence or sentences to be imposed and the court is satisfied that any such agreement is unlikely within a reasonable time. The provisions of this paragraph shall apply with respect to consecutive counts of murder in the first degree. In the event the jury is unable to reach unanimous agreement, the court must sentence the defendant in accordance with subdivisions one through three of section 70.00 of the penal law with respect to any count or counts of murder in the first degree upon which the jury failed to reach unanimous agreement as to the sentence to be imposed.

(d) If the jury unanimously determines that a sentence of death should be imposed, the court must thereupon impose a sentence of death. Thereafter, however, the court may, upon written motion of the defendant, set aside the sentence of death upon any of the grounds set forth in section 330.30. The procedures set forth in sections 330.40 and 330.50, as applied to separate sentencing proceedings under this section, shall govern the motion and the court upon granting the motion shall, except as may otherwise be required by subdivision one of section 330.50, direct a new sentencing proceeding pursuant to this section. Upon granting the motion upon any of the grounds set forth in section 330.30 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

(e) If the jury unanimously determines that a sentence of life imprisonment without parole should be imposed the court must thereupon impose a sentence of life imprisonment without parole.

(f) Where a sentence has been unanimously determined by the jury it must be recorded on the minutes and read to the jury, and the jurors must be collectively asked whether such is their sentence. Even though no juror makes any declaration in the negative, the jury must, if either party makes such an application, be polled and each juror separately asked whether the sentence announced by the foreman is in all respects his or her sentence. If, upon either the collective or the separate inquiry, any juror answers in the negative, the court must refuse to accept the sentence and must direct the jury to resume its deliberation. If no disagreement is expressed, the jury must be discharged from the case.

12. (a) Upon the conviction of a defendant for the offense of murder in the first degree as defined in section 125.27 of the penal law, the court shall, upon oral or written motion of the defendant based upon a showing that there is reasonable cause to believe that the defendant is mentally retarded, promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. Upon the consent of both parties, such a hearing, or a portion thereof, may be conducted by the court contemporaneously with the separate sentencing proceeding in the presence of the sentencing jury, which in no event shall be the trier of fact with respect to the hearing. At such hearing the defendant has the burden of proof by a preponderance of the evidence that he or she is mentally retarded. The court shall defer rendering any finding pursuant to this subdivision as to

whether the defendant is mentally retarded until a sentence is imposed pursuant to this section.

(b) In the event the defendant is sentenced pursuant to this section to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole, the court shall not render a finding with respect to whether the defendant is mentally retarded.

(c) In the event the defendant is sentenced pursuant to this section to death, the court shall thereupon render a finding with respect to whether the defendant is mentally retarded. If the court finds the defendant is mentally retarded, the court shall set aside the sentence of death and sentence the defendant either to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. If the court finds the defendant is not mentally retarded, then such sentence of death shall not be set aside pursuant to this subdivision.

(d) In the event that a defendant is convicted of murder in the first degree pursuant to subparagraph (iii) of paragraph (a) of subdivision one of section 125.27 of the penal law, and the killing occurred while the defendant was confined or under custody in a state correctional facility or local correctional institution, and a sentence of death is imposed, such sentence may not be set aside pursuant to this subdivision upon the ground that the defendant is mentally retarded. Nothing in this paragraph or paragraph (a) of this subdivision shall preclude a defendant from presenting mitigating evidence of mental retardation at the separate sentencing proceeding.

(e) The foregoing provisions of this subdivision notwithstanding, at a reasonable time prior to the commencement of trial the defendant may, upon a written motion alleging reasonable cause to believe the defendant is mentally retarded, apply for an order directing that a mental retardation hearing be conducted prior to trial. If, upon review of the defendant's motion and any response thereto, the court finds reasonable cause to believe the defendant is mentally retarded, it shall promptly conduct a hearing without a jury to determine whether the defendant is mentally retarded. In the event the court finds after the hearing that the defendant is not mentally retarded, the court must, prior to commencement of trial, enter an order so stating, but nothing in this paragraph shall preclude a defendant from presenting mitigating evidence of mental retardation at a separate sentencing proceeding. In the event the court finds after the hearing that the defendant, based upon a preponderance of the evidence, is mentally retarded, the court must, prior to commencement of trial, enter an order so stating. Unless the order is reversed on an appeal by the people or unless the provisions of paragraph (d) of this subdivision apply, a separate sentencing proceeding under this section shall not be conducted if the defendant is thereafter convicted of murder in the first degree. In the event a separate sentencing proceeding is not conducted, the court, upon conviction of a defendant for the crime of murder in the first degree, shall sentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Whenever a mental retardation hearing is held and a finding is rendered pursuant to this paragraph, the court may not conduct a hearing pursuant to paragraph (a) of this

subdivision. For purposes of this subdivision and paragraph (b) of subdivision nine of this section, "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior which were manifested before the age of eighteen.

(f) In the event the court enters an order pursuant to paragraph (e) of this subdivision finding that the defendant is mentally retarded, the people may appeal as of right from the order pursuant to subdivision ten of section 450.20 of this chapter. Upon entering such an order the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order finding that the defendant is mentally retarded. The taking of an appeal by the people stays the effectiveness of the court's order and any order fixing a date for trial. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that appeals pursuant to this paragraph are expeditiously perfected, reviewed and determined so that pretrial delays are minimized. Prior to adoption of the rules, the court of appeals shall issue proposed rules and receive written comments thereon from interested parties.

13. (a) As used in this subdivision, the term "psychiatric evidence" means evidence of mental disease, defect or condition in connection with either a mitigating factor defined in this section or a mental retardation hearing pursuant to this section to be offered by a psychiatrist, psychologist or other person who has received training, or education, or has experience relating to the identification, diagnosis, treatment or evaluation of mental disease, mental defect or mental condition.

(b) When either party intends to offer psychiatric evidence, the party must, within a reasonable time prior to trial, serve upon the other party and file with the court a written notice of intention to present psychiatric evidence. The notice shall include a brief but detailed statement specifying the witness, nature and type of psychiatric evidence sought to be introduced. If either party fails to serve and file written notice, no psychiatric evidence is admissible unless the party failing to file thereafter serves and files such notice and the court affords the other party an adjournment for a reasonable period. If a party fails to give timely notice, the court in its discretion may impose upon offending counsel a reasonable monetary sanction for an intentional failure but may not in any event preclude the psychiatric evidence. In the event a monetary sanction is imposed, the offending counsel shall be personally liable therefor, and shall not receive reimbursement of any kind from any source in order to pay the cost of such monetary sanction. Nothing contained herein shall preclude the court from entering an order directing a party to provide timely notice.

(c) When a defendant serves notice pursuant to this subdivision, the district attorney may make application, upon notice to the defendant, for an order directing that the defendant submit to an examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker designated by the district attorney, for the purpose of rebutting evidence offered by the defendant with respect to a mental disease, defect, or condition in connection with either a mitigating factor defined in this section, including whether the defendant was acting under duress, was mentally or emotionally disturbed or mentally retarded, or was under the influence of alcohol or any drug. If the application is granted, the district attorney shall schedule a time and place for the exami-

nation, which shall be recorded. Counsel for the people and the defendant shall have the right to be present at the examination. A transcript of the examination shall be made available to the defendant and the district attorney promptly after its conclusion. The district attorney shall promptly serve on the defendant a written copy of the findings and evaluation of the examiner. If the court finds that the defendant has wilfully refused to cooperate fully in an examination pursuant to this paragraph, it shall, upon request of the district attorney, instruct the jury that the defendant did not submit to or cooperate fully in such psychiatric examination. When a defendant is subjected to an examination pursuant to an order issued in accordance with this subdivision, any statement made by the defendant for the purpose of the examination shall be inadmissible in evidence against him in any criminal action or proceeding on any issue other than that of whether a mitigating factor has been established or whether the defendant is mentally retarded, but such statement is admissible upon such an issue whether or not it would otherwise be deemed a privileged communication.

14. (a) At a reasonable time prior to the sentencing proceeding or a mental retardation hearing:

(i) the prosecutor shall, unless previously disclosed and subject to a protective order, make available to the defendant the statements and information specified in subdivision one of section 240.45 and make available for inspection, photographing, copying or testing the property specified in subdivision one of section 240.20; and

(ii) the defendant shall, unless previously disclosed and subject to a protective order, make available to the prosecution the statements and information specified in subdivision two of section 240.45 and make available for

inspection, photographing, copying or testing, subject to constitutional limitations, the reports, documents and other property specified in subdivision one of section 240.30.

(b) Where a party refuses to make disclosure pursuant to this section, the provisions of section 240.35, subdivision one of section 240.40 and section 240.50 shall apply.

(c) If, after complying with the provisions of this section or an order pursuant thereto, a party finds either before or during a sentencing proceeding or mental retardation hearing, additional material subject to discovery or covered by court order, the party shall promptly make disclosure or apply for a protective order.

(d) If the court finds that a party has failed to comply with any of the provisions of this section, the court may enter any of the orders specified in subdivision one of section 240.70.

15. The court of appeals shall formulate and adopt rules for the development of forms for use by the jury in recording its findings and determinations of sentence.

§ 21. Subdivision 1 of section 440.20 of the criminal procedure law is amended to read as follows:

1. At any time after the entry of a judgment, the court in which the judgment was entered may, upon motion of the defendant, set aside the sentence upon the ground that it was unauthorized, illegally imposed or otherwise invalid as a matter of law. *Where the judgment includes a sentence of death, the court may also set aside the sentence upon any of the grounds set forth in paragraph (b), (c), (f), (g) or (h) of subdivision one of section 440.10 as applied to a separate sentencing proceeding under sec-*

tion 400.27, provided, however, that to the extent the ground or grounds asserted include one or more of the aforesaid paragraphs of subdivision one of section 440.10, the court must also apply subdivisions two and three of section 440.10, other than paragraph (d) of subdivision two of such section, in determining the motion. In the event the court enters an order granting a motion to set aside a sentence of death under this section, the court must either direct a new sentencing proceeding in accordance with section 400.27 or, to the extent that the defendant cannot be resentenced to death consistent with the laws of this state or the constitution of this state or of the United States, resentence the defendant to life imprisonment without parole or to a sentence of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole. Upon granting the motion upon any of the grounds set forth in the aforesaid paragraphs of subdivision one of section 440.10 and setting aside the sentence, the court must afford the people a reasonable period of time, which shall not be less than ten days, to determine whether to take an appeal from the order setting aside the sentence of death. The taking of an appeal by the people stays the effectiveness of that portion of the court's order that directs a new sentencing proceeding.

§ 22. Section 450.20 of the criminal procedure law is amended by adding a new subdivision 10 to read as follows:

10. An order, entered pursuant to paragraph (e) of subdivision twelve of section 400.27, finding that the defendant is mentally retarded.

§ 23. Subdivision 3 of section 450.70 of the criminal procedure law is amended and a new subdivision 4 is added to read as follows:

3. An order denying a motion, made pursuant to section 440.20, to set aside a sentence of death[.]*;*

4. An order denying a motion, made pursuant to paragraph (d) of subdivision eleven of section 400.27, to set aside a sentence of death.

§ 24. Section 450.80 of the criminal procedure law is amended to read as follows:

§ 450.80 Appeal by people directly to court of appeals; in what cases authorized.

An appeal directly to the court of appeals may be taken as of right by the people from the following orders of a superior court:

1. An order, entered pursuant to section 440.10, vacating a judgment including a sentence of death;

2. An order, entered pursuant to section 440.20, setting aside a sentence of death[.]*;*

3. An order, entered pursuant to paragraph (d) of subdivision eleven of section 400.27, setting aside a sentence of death;

4. An order, entered pursuant to subdivision twelve of section 400.27, setting aside a sentence of death.

§ 25. Subdivision 2 of section 460.40 of the criminal procedure law, as added by chapter 209 of the laws of 1990, is amended to read as follows:

2. The taking of an appeal by the people to an intermediate appellate court pursuant to subdivision one-a of section 450.20, from an order reducing a count or counts

of an indictment or dismissing an indictment and directing the filing of a prosecutor's information, stays the effect of such order. *In addition, the taking of an appeal by the people to an intermediate appellate court pursuant to subdivision one of section 450.20, from an order dismissing a count or counts of an indictment charging murder in the first degree, stays the effect of such order.*

§ 26. Section 460.40 of the criminal procedure law is amended by adding a new subdivision 3 to read as follows:

3. Within six months of the effective date of this subdivision, the court of appeals shall adopt rules to ensure that a defendant is granted a stay of the execution of any death warrant issued pursuant to article twenty-two-B of the correction law to allow the defendant an opportunity to prepare and timely file an initial motion pursuant to section 440.10 or 440.20 seeking to set aside a sentence of death or vacate a judgment including a sentence of death and to allow the motion and any appeal from the denial thereof to be timely determined. The rules shall provide that in the event a defendant seeks to file any subsequent motion with respect to the judgment or sentence following a final determination of the defendant's initial motion pursuant to section 440.10 or 440.20, a motion for a stay of the execution of the death warrant may only be granted for good cause shown. The people and the defendant shall have a right to appeal to the court of appeals from orders granting or denying such stay motions and any rules adopted pursuant to this subdivision shall provide that the court of appeals may affirm such orders, reverse them or modify them upon such terms as the court deems appropriate and shall provide for the expeditious perfection and determination of such appeals. Prior to adoption of the rules, the court of

appeals shall issue proposed rules and receive written comments thereon from interested parties.

§ 27. Section 470.30 of the criminal procedure law is amended to read as follows:

§ 470.30 Determination by court of appeals of appeals taken directly thereto from judgments and orders of criminal courts.

1. Wherever appropriate, the rules set forth in sections 470.15 and 470.20, governing the consideration and determination by intermediate appellate courts of appeals thereto from judgments and orders of criminal courts, and prescribing their scope of review and the corrective action to be taken by them upon reversal or modification, apply equally to the consideration and determination by the court of appeals of appeals taken directly thereto, pursuant to sections 450.70 and 450.80, from judgments and orders of superior criminal courts[; except that the court of appeals may not as a matter of discretion in the interest of justice set aside, reduce or change a sentence of death as being unduly harsh or severe.

2. Upon affirming a judgment including a sentence of death, the court of appeals, by an order signed by a majority of the judges thereof, must fix the week during which such sentence of death is to be executed, and the sentence must be executed according to law. The entry of an order granting a motion for reargument of such an appeal, however, stays the execution of the judgment. If the judgment is thereafter reaffirmed a new execution date must be fixed by the court].

2. Whenever a sentence of death is imposed, the judgment and sentence shall be reviewed on the record by the court of appeals. Review by the court of appeals pur-

suant to subdivision one of section 450.70 may not be waived.

3. With regard to the sentence, the court shall, in addition to exercising the powers and scope of review granted under subdivision one of this section, determine:

(a) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary or legally impermissible factor including whether the imposition of the verdict or sentence was based upon the race of the defendant or a victim of the crime for which the defendant was convicted;

(b) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant. In conducting such review the court, upon request of the defendant, in addition to any other determination, shall review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted; and

(c) whether the decision to impose the sentence of death was against the weight of the evidence.

4. The court shall include in its decision: (a) the aggravating and mitigating factors established in the record on appeal; and (b) those similar cases it took into consideration.

5. In addition to exercising any other corrective action pursuant to subdivision one of this section, the court, with regard to review of a sentence of death, shall be authorized to:

(a) affirm the sentence of death; or

(b) set the sentence aside and remand the case for resentencing pursuant to the procedures set forth in section 400.27 for a determination as to whether the defendant shall be sentenced to death, life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole; or

(c) set the sentence aside and remand the case for resentencing by the court for a determination as to whether the defendant shall be sentenced to life imprisonment without parole or to a term of imprisonment for the class A-I felony of murder in the first degree other than a sentence of life imprisonment without parole.

§ 28. Paragraph (b) of subdivision 8 of section 700.05 of the criminal procedure law, as amended by chapter 490 of the laws of 1992, is amended to read as follows:

(b) Any of the following felonies: assault in the second degree as defined in section 120.05 of the penal law, assault in the first degree as defined in section 120.10 of the penal law, reckless endangerment in the first degree as defined in section 120.25 of the penal law, promoting a suicide attempt as defined in section 120.30 of the penal law, criminally negligent homicide as defined in section 125.10 of the penal law, manslaughter in the second degree as defined in section 125.15 of the penal law, manslaughter in the first degree as defined in section 125.20 of the penal law, murder *in the second degree* as defined in section 125.25 of the penal law, *murder in the first degree as defined in section 125.27 of the penal law,* abortion in the second degree as defined in section 125.40 of the penal law, abortion in the first degree as defined in section 125.45 of the penal law, rape in the third degree as defined in section 130.25 of the penal law, rape in the second degree as defined in section

130.30 of the penal law, rape in the first degree as defined in section 130.35 of the penal law, sodomy in the third degree as defined in section 130.40 of the penal law, sodomy in the second degree as defined in section 130.45 of the penal law, sodomy in the first degree as defined in section 130.50 of the penal law, sexual abuse in the first degree as defined in section 130.65 of the penal law, unlawful imprisonment in the first degree as defined in section 135.10 of the penal law, kidnapping in the second degree as defined in section 135.20 of the penal law, kidnapping in the first degree as defined in section 135.25 of the penal law, custodial interference in the first degree as defined in section 135.50 of the penal law, coercion in the first degree as defined in section 135.65 of the penal law, criminal trespass in the first degree as defined in section 140.17 of the penal law, burglary in the third degree as defined in section 140.20 of the penal law, burglary in the second degree as defined in section 140.25 of the penal law, burglary in the first degree as defined in section 140.30 of the penal law, criminal mischief in the third degree as defined in section 145.05 of the penal law, criminal mischief in the second degree as defined in section 145.10 of the penal law, criminal mischief in the first degree as defined in section 145.12 of the penal law, criminal tampering in the first degree as defined in section 145.20 of the penal law, arson in the fourth degree as defined in section 150.05 of the penal law, arson in the third degree as defined in section 150.10 of the penal law, arson in the second degree as defined in section 150.15 of the penal law, arson in the first degree as defined in section 150.20 of the penal law, grand larceny in the fourth degree as defined in section 155.30 of the penal law, grand larceny in the third degree as defined in section 155.35 of the penal law, grand larceny in the second degree as defined

in section 155.40 of the penal law, grand larceny in the first degree as defined in section 155.42 of the penal law, robbery in the third degree as defined in section 160.05 of the penal law, robbery in the second degree as defined in section 160.10 of the penal law, robbery in the first degree as defined in section 160.15 of the penal law, unlawful use of secret scientific material as defined in section 165.07 of the penal law, criminal possession of stolen property in the fourth degree as defined in section 165.45 of the penal law, criminal possession of stolen property in the third degree as defined in section 165.50 of the penal law, criminal possession of stolen property in the second degree as defined by section 165.52 of the penal law, criminal possession of stolen property in the first degree as defined by section 165.54 of the penal law, trademark counterfeiting in the first degree as defined in section 165.73 of the penal law, forgery in the second degree as defined in section 170.10 of the penal law, forgery in the first degree as defined in section 170.15 of the penal law, criminal possession of a forged instrument in the second degree as defined in section 170.25 of the penal law, criminal possession of a forged instrument in the first degree as defined in section 170.30 of the penal law, criminal possession of forgery devices as defined in section 170.40 of the penal law, falsifying business records in the first degree as defined in section 175.10 of the penal law, tampering with public records in the first degree as defined in section 175.25 of the penal law, offering a false instrument for filing in the first degree as defined in section 175.35 of the penal law, issuing a false certificate as defined in section 175.40 of the penal law, escape in the second degree as defined in section 205.10 of the penal law, escape in the first degree as defined in section 205.15 of the penal law, absconding from [work] *temporary* release

in the first degree as defined in section 205.17 of the penal law, promoting prison contraband in the first degree as defined in section 205.25 of the penal law, hindering prosecution in the second degree as defined in section 205.60 of the penal law, hindering prosecution in the first degree as defined in section 205.65 of the penal law, criminal possession of a weapon in the third degree as defined in subdivisions two, three, four and five of section 265.02 of the penal law, criminal possession of a weapon in the second degree as defined in section 265.03 of the penal law, criminal possession of a dangerous weapon in the first degree as defined in section 265.04 of the penal law, manufacture, transport, disposition and defacement of weapons and dangerous instruments and appliances defined as felonies in subdivisions one, two, and three of section 265.10 of the penal law, sections 265.11, 265.12 and 265.13 of the penal law, or prohibited use of weapons as defined in subdivision two of section 265.35 of the penal law, relating to firearms and other dangerous weapons;

§ 29. The judiciary law is amended by adding a new section 35-b to read as follows:

§ 35-b. Assignment of counsel and related services in criminal actions in which a death sentence may be imposed. 1. Notwithstanding any other provision of law to the contrary, in every criminal action in which a defendant is charged with murder in the first degree as defined in section 125.27 of the penal law, or in any criminal action in which a defendant is charged with murder in the second degree as defined in section 125.25 of the penal law and the district attorney confirms upon inquiry by the court that the district attorney is undertaking an investigation to determine whether the defendant can or should be charged with murder in the first

degree as defined in section 125.27 of the penal law and the court determines that there is a reasonable likelihood the defendant will be so charged, if the defendant is or becomes financially unable to obtain adequate representation or investigative, expert or other reasonably necessary services at any time either (a) prior to judgment, or (b) after the entry of a judgment imposing a sentence of death but before final resolution of a direct appeal pursuant to subdivision one of section 450.70 of the criminal procedure law and of an appeal pursuant to subdivision two or three of section 450.70 of the criminal procedure law from an order denying an initial post judgment motion pursuant to section 440.10 or 440.20 of the criminal procedure law, the defendant shall be entitled to the appointment of counsel and investigative, expert and such other reasonably necessary services in accordance with the provisions of this section. Prior to the appointment of counsel pursuant to this section, the court shall determine whether the defendant is or has become financially unable to obtain adequate representation. In the event such defendant seeks to file any subsequent motion, he or she shall not be eligible for the appointment of counsel pursuant to this section.

2. The appointment of counsel shall be made by the trial court if made prior to the entry of a judgment including a sentence of death or by the court of appeals, except as otherwise provided in this subdivision, if made after the entry of a judgment including a sentence of death. With respect to counsel at trial and at a separate sentencing proceeding, the court shall appoint two attorneys, one to be designated "lead" counsel and the other to be designated "associate" counsel. The appointment of any such counsel shall be made from a list of four proposed teams of qualified lead and associate counsel provided to the appropriate court by the capital defender

office. Alternatively, the court may, with the consent of the capital defender office, appoint the office to represent the defendant. At least one of the proposed teams of qualified lead and associate counsel on any list submitted pursuant to this subdivision shall regularly practice within the judicial department in which the defendant has been charged. With respect to a jurisdiction in which the capital defender office has entered into an agreement to provide representation with a legal aid society, office of public defender or other not-for-profit organization providing criminal defense services, the capital defender office may designate the society, public defender or organization for appointment as counsel pursuant to this section and need not submit a list of four proposed teams of qualified lead and associate counsel for appointment. In the event that counsel is not appointed pursuant to the foregoing provisions of this subdivision, the court may appoint any attorney whose name appears on a roster established pursuant to subdivision five of this section for appointment as lead or associate counsel. In the event no such attorney is available, the court may appoint an attorney eligible for appointment pursuant to article eighteen-B of the county law who is competent to represent defendants charged with murder and other serious felonies. With respect to an appeal from a judgment including a sentence of death, the court of appeals shall assign lead counsel only, but for good cause shown, the court may assign associate counsel. With respect to an initial motion pursuant to section 440.10 or 440.20 of the criminal procedure law, and any appeal therefrom, the appropriate court shall assign lead counsel only. The trial court shall assign counsel in connection with such a motion and the court of appeals shall assign counsel in connection with any appeal therefrom.

3. There is hereby created a capital defender office, to be governed by a three member board of directors. No attorney who is employed as a judge, prosecutor or in a law enforcement capacity shall be eligible to serve on such board. The board members shall be appointed in the following manner: one member shall be appointed by the chief judge of the court of appeals, one member shall be appointed by the temporary president of the senate and one member shall be appointed by the speaker of the assembly. Each member shall be appointed to serve a three year term and vacancies shall be filled in the same manner as the original appointment. Members of the board shall receive no compensation but shall be reimbursed all reasonable and necessary expenses incidental to their duties.

4. Within the amounts appropriated therefor:

(a) The board of directors shall have the authority to appoint a capital defender, who shall have the authority in consultation with the board of directors to hire attorneys as deputy capital defenders, investigators and such other staff as the capital defender and the board of directors deem necessary to effectuate the purposes of the capital defender office.

(b) The capital defender office shall be authorized as follows:

(i) Upon appointment in accordance with the provisions of this section, to act as counsel for defendants and to furnish such investigative, expert and other reasonably necessary services as the capital defender deems appropriate;

(ii) To provide legal or other advice or, to the extent not otherwise available, any other assistance to counsel appointed pursuant to this section;

(iii) To provide investigative, expert or other reasonably necessary services to defendants charged with murder in the first degree who are not represented by the capital defender office, provided that such defendants (A) are or have become financially unable to obtain adequate investigative, expert or other reasonably necessary services and are represented by counsel appointed pursuant to this section, and (B) have obtained pursuant to this section the approval of a trial court for the same investigative, expert or other reasonably necessary services, provided, however, that such defendants have not received such services from other sources;

(iv) To determine, in consultation with the administrative board of the judicial conference, proposed minimum standards for lead and associate counsel in capital cases. In determining the minimum standards, the capital defender office in consultation with the administrative board of the judicial conference shall consider among other factors both the needs of the state for an adequate number of attorneys to represent defendants in capital cases and the needs of defendants in capital cases for competent counsel. The minimum standards, and any modifications thereto which the capital defender office in consultation with the administrative board of the judicial conference may from time to time propose, shall be submitted for approval to the court of appeals. Prior to approving the minimum standards and any modifications thereto the court shall invite the submission of written comments from interested parties;

(v) To provide continuing legal education, training, advice and assistance to attorneys representing or seeking to represent defendants in capital cases; and

(vi) To enter into an agreement with a legal aid society, office of public defender or other not-for-profit

organization providing criminal defense services to designate and provide counsel pursuant to this section. Any agreement shall require that the society, public defender or organization effectuate the purposes and provisions of this section and may be terminated by the capital defender office by serving notice on the society, public defender or organization sixty days prior to the effective date of termination. Upon the termination of any agreement, the representation provided by the society, public defender or organization shall continue until the proceeding is concluded or the court relieves the society, public defender or organization and appoints successor counsel pursuant to this section. The capital defender office may require such reports as it deems necessary in connection with such agreement and shall monitor compliance with its terms. A society, public defender or organization which enters into an agreement pursuant to this section shall not be the exclusive provider of counsel within such society's, public defender's or organization's jurisdiction. In the event that a defendant is not represented by such a society, public defender or organization due to a conflict, counsel shall be appointed in accordance with the provisions of subdivision two of this section.

5. (a) A screening panel shall be established in each judicial department consisting of four members, two of whom shall be appointed by the board of directors of the capital defender office and two of whom shall be appointed by the presiding justice of each judicial department. Each screening panel shall establish and periodically update a roster of attorneys qualified for appointment as lead counsel or associate counsel pursuant to the provisions of this section. The capital defender office, in consultation with the administrative board of the judicial conference, shall promulgate reg-

ulations to provide that qualified attorneys whose names appear on such rosters and who wish to be appointed to represent defendants in capital cases, are given fair opportunity to receive such appointments. Each screening panel shall also promulgate and periodically update, in consultation with the administrative board of the judicial conference, a schedule of fees to be paid attorneys pursuant to this section in each department, which schedule shall be subject to the approval of the court of appeals. Prior to approving fee schedules, the court shall invite the submission of written comments from interested parties. Fee schedules shall be promulgated and approved after reviewing the rates of compensation generally paid in the department to attorneys with substantial experience in the representation of defendants charged with murder or other serious felonies, and shall be adequate to ensure that qualified attorneys are available to represent defendants eligible to receive counsel pursuant to this section.

(b) Each appellate division, in consultation with the screening panel, shall establish the rates of fees and expenses to be paid for expert, investigative and other reasonably necessary services pursuant to this section.

6. (a) When a defendant has been charged in an accusatory instrument with murder in the first degree as defined in section 125.27 of the penal law or with murder in the second degree as defined in section 125.25 of the penal law, the district attorney shall notify the capital defender office.

(b) The clerk of the superior court wherein a judgment that includes a sentence of death has been entered and the clerk of the court of appeals upon an order affirming a judgment that includes a sentence of death shall notify the capital defender office of the judgment or order.

Notice need not be given when the defendant has retained counsel of his or her own choosing or when appellate or post-conviction counsel has already been appointed pursuant to this section and when counsel advises that he or she will continue to act on the defendant's behalf.

(c) Notice to the capital defender office required pursuant to paragraph (a) or (b) of this subdivision shall consist of telephone, facsimile, E-mail or other prompt electronic means of notification forthwith, which shall be followed by first class mail notification within two business days of the charge, sentence or affirmance. The failure to give notice shall not affect the validity of any indictment, conviction, judgment or order.

7. Whenever a defendant is charged with murder in the first degree, or a defendant has been charged with murder in the second degree as defined in section 125.25 of the penal law and the court determines after confirmation by the district attorney pursuant to subdivision one of this section that there is a reasonable likelihood the defendant will be charged with murder in the first degree and the defendant is financially unable to obtain counsel as determined by the court and an attorney has not yet been appointed to represent such defendant pursuant to the provisions of this section, the capital defender office may provide or arrange to provide temporary legal representation to the defendant. No arraignment shall be delayed on account of any representation to be provided or arranged pursuant to this subdivision. Any temporary representation provided pursuant to this subdivision shall cease upon the court's appointment of an attorney pursuant to this section.

8. Whenever prior to entry of judgment a defendant is charged with murder in the first degree, or a defendant

has been charged with murder in the second degree as defined in section 125.25 of the penal law and the court determines after confirmation by the district attorney pursuant to subdivision one of this section that there is a reasonable likelihood the defendant will be charged with murder in the first degree, and the defendant is or becomes financially unable, as determined by the court, to obtain adequate investigative, expert or other reasonably necessary services and the court has not appointed the capital defender office to represent the defendant, the trial court shall authorize the defendant's attorney to obtain such services on behalf of the defendant and shall order the payment of reasonable fees and expenses therefor; provided, however, that the court shall first find in an ex parte proceeding that such investigative, expert or other services are reasonably necessary for the representation of the defendant whether in connection with issues relating to guilt or sentencing. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision and payment for such services nunc pro tunc. Whenever a court disapproves, in whole or in part, a request for authorization or voucher, the defendant may apply to a justice of an intermediate appellate court for an order approving the request or voucher.

9. Any compensation, fee or expense to be paid pursuant to this section shall be a state charge payable on vouchers approved by the court which fixed the same, after audit by and on the warrant of the comptroller. Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. With respect to

compensation to be paid to counsel pursuant to this section, the appropriate court shall review and determine the reasonableness of the number of hours expended out of court.

10. Whenever it appears that a defendant is financially able to obtain adequate representation or investigative, expert or other such services, or to make partial payment for such representation or other services, counsel shall inform the court and the court may terminate the assignment of counsel or authorize payment, as the interests of justice may dictate, to the capital defender office or the state.

11. The provisions of this section shall cease to apply on the tenth day, or such later day as the court may determine to be reasonably necessary to provide for successor counsel if prior counsel is to be relieved, following the entry of either a final judgment or order not subject to further review by an appellate court, or a prosecutorial determination, which necessarily precludes an imposition of a sentence of death, whereupon the provisions of article eighteen-A or article eighteen-B of the county law shall be applicable.

12. Nothing in this section shall be construed to authorize the appointment of counsel, investigative, expert or other services or the provision of assistance, other than continuing legal education, training and advice, with respect to the filing, litigation, or appeal of a petition for a writ of habeas corpus in any federal court; nor shall anything in this section be construed to authorize the appointment of attorneys, investigative, expert or other services in connection with any proceedings other than trials, including separate sentencing proceedings, of defendants charged with murder in the first degree, appeals from judgments including a sen-

tence of death, and initial motions pursuant to section 440.10 or 440.20 of the criminal procedure law and any appeals therefrom.

§ 30. The judiciary law is amended by adding a new section 211-a to read as follows:

§ 211-a. Required reports in capital cases. The court of appeals shall promulgate rules to ensure that in every criminal action in which a defendant is indicted for the commission of an offense defined in section 125.27 of the penal law, the clerk of the trial court shall prepare a data report as provided by this section not later than forty-five days following the disposition of the case by the trial court; provided, however, that if the indictment is dismissed, no such data report shall be required. The data reports shall be in a form determined by the court of appeals. Data reports shall be prepared by the clerk of the trial court by reviewing the record and upon consultation with the prosecutor and the attorney for the defendant and after completion shall be forwarded to the clerk of the court of appeals. The form and the content of the report shall be consistent with the purpose of assisting the court of appeals in determining pursuant to section 470.30 of the criminal procedure law, whether a particular sentence of death is disproportionate or excessive in the context of penalties imposed in similar cases, considering both the crime or crimes and the defendant. Data reports developed pursuant to this section shall be compiled into a single uniform capital case data report, which shall be available for use by appellants in capital cases in accordance with disclosure rules promulgated by the court of appeals.

§ 31. The county law is amended by adding a new section 707 to read as follows:

§ 707. Payments of expert fees in criminal cases in which the death penalty may be imposed. 1. Notwithstanding any other provision of law to the contrary, upon a finding in an ex parte proceeding that expert services are reasonably necessary for the prosecution of the case whether in connection with issues relating to guilt or sentencing or that investigative services relating to a separate sentencing proceeding or mental retardation hearing pursuant to section 400.27 of the criminal procedure law are reasonably necessary, the trial court shall authorize the payment of fees and expenses for such services. Upon a finding that timely procurement of such services could not practicably await prior authorization, the court may authorize the provision and payment for such services nunc pro tunc.

2. Each appellate division shall establish the rates of fees and expenses to be paid for expert and investigative services pursuant to subdivision one of this section.

3. Any fee or expense to be paid pursuant to this section shall be a state charge payable on vouchers approved by the court which fixed the same after audit by and on the warrant of the comptroller.

4. Whenever a court disapproves, in whole or in part, a request for authorization or voucher, the district attorney may apply to a justice of an intermediate appellate court for an order approving the request or voucher.

§ 32. Article 22-B of the correction law is REPEALED and a new article 22-B is added to read as follows:

ARTICLE 22-B

THE DEATH PENALTY

Section 650. Warrant for execution of death sentence.

651. Time of execution.

652. Delivery of warrant and confinement.

653. Transmittal of record to the governor.

654. Governor may consult.

655. Governor only to reprieve.

656. Proceeding when person under sentence of death may be incompetent.

657. Proceeding when person under sentence of death is pregnant.

658. Death penalty inflicted by lethal injection.

659. Facility.

660. Persons authorized to be present at execution.

661. Examination of convicted person's body and certificate.

662. Disposition of body.

§ 650. Warrant for execution of death sentence. 1. When a person is sentenced to the punishment of death, the justice or judge who presided at the sentencing proceeding, or if that justice or judge is unavailable for any reason, then any justice of the supreme court of the department in which the defendant was sentenced, must, within seven days, make out, sign and deliver to the sheriff of the county, a warrant directed to the commissioner or to the superintendent of an institution in the department designated by the commissioner. Such war-

rant shall state the conviction and sentence, appoint a week on which the sentence shall be executed, and command the commissioner to execute the sentence within that week. In counties within the city of New York, or in the county of Westchester, such warrant shall be made out as aforesaid, signed and delivered to the commissioner of correction of such city or county.

2. If the execution of the sentence shall be delayed while the conviction or sentence is being appealed, a justice or judge authorized to act pursuant to subdivision one of this section, at the conclusion of the state appellate process, if the conviction or sentence is not set aside, must, within seven days, make out, sign and deliver another warrant as provided in subdivision one of this section. If the execution of the sentence on the date appointed is delayed by any other cause, the justice or judge shall, as soon as such cause ceases to exist, make out, sign and deliver another warrant.

§ 651. Time of execution. The week of execution appointed in the warrant shall be not less than thirty days and not more than sixty days after the issuance of the warrant. The date of execution within said week shall be left to the discretion of the commissioner, but the date and hour of the execution shall be announced publicly no later than seven days prior to said execution.

§ 652. Delivery of warrant and confinement. 1. Within ten days after the issuance of a warrant as provided in section six hundred fifty of this article, the sheriff or the commissioner of correction, if within the city of New York or county of Westchester, must deliver the warrant and the person sentenced, if that person is not already in the custody of the department, to the department or to the superintendent of the state institution designated by the commissioner. Upon the issuance of the warrant the

court shall cause a copy to be personally delivered to the convicted person and shall send a copy of the warrant to the convicted person's last attorney of record.

2. From the time of the delivery of the warrant and until the imposition of the punishment of death upon the convicted person, unless discharged from the sentence, such person may, in the commissioner's discretion, either be kept isolated from the general prison population in a designated institution or confined as otherwise provided by law. The commissioner, in his discretion, may determine that the safety and security of the facility, or of the inmate population, or of the staff, or of the inmate, would not be jeopardized by the inmate's confinement within the general prison population.

3. The commissioner may promulgate rules and regulations concerning visitation of inmates sentenced to death. Such rules and regulations may provide that inmates sentenced to death are subject to different visitation policies and procedures than inmates who are not sentenced to death.

§ 653. Transmittal of record to the governor. Within a reasonable time following the issuance of the warrant as provided in section six hundred fifty of this article, the clerk of the court in the county in which the person was sentenced to death shall transmit to the governor a statement of conviction and sentence, and the transcripts of both the trial and the sentencing proceedings, including, to the extent practicable, any exhibits introduced therein.

§ 654. Governor may consult. The governor is authorized to request the opinion of the attorney general, the district attorney, and the convicted person's counsel, or

any of them, as to whether the execution of the person should be reprieved or suspended.

§ 655. Governor only to reprieve. No judge, court, or officer, other than the governor, can reprieve the execution of a person sentenced to death. This section does not apply to a stay authorized by law.

§ 656. Proceeding when person under sentence of death may be incompetent. 1. The state may not execute an inmate who is incompetent. An inmate is "incompetent" when, as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out.

2. Upon the filing of a petition in the supreme court in either the county in which an inmate sentenced to death is confined or in the county in which the inmate was prosecuted alleging that the inmate is incompetent, the court shall issue an order staying the execution if and to the extent a stay is necessary to permit determination of the petition. Upon application of either the inmate's counsel or the district attorney the petition may be transferred to the court in which the inmate was convicted unless such transfer would be unduly burdensome or impracticable. Promptly upon filing the petition, the court shall appoint a commission of three psychiatric examiners, hereinafter referred to as "the psychiatric commissioners," to inquire into the inmate's competence and report to the court as to the inmate's competence. The psychiatric commissioners shall be impartial and must be qualified psychiatrists or certified psychologists. Before commencing an inquiry, the psychiatric commissioners must take the oath prescribed in rule forty-three hundred fifteen of the civil practice law and rules to be taken by referees. The petition may be filed

by the inmate, the inmate's counsel, an employee of the department, the inmate's legal guardian, a member of such inmate's immediate family or, in the event that the inmate does not have regular contact with a member of his or her immediate family, a bona fide friend who has maintained regular contact with the inmate. The petition must be accompanied by an affidavit of at least one qualified psychiatrist or certified psychologist who, based at least in part on personal examination, attests that in the psychiatrist's or psychologist's professional opinion the inmate is incompetent and lists the pertinent facts therefor. For purposes of this section the terms "qualified psychiatrist" and "certified psychologist" have the meaning set forth in section 730.10 of the criminal procedure law.

3. The petition shall be served upon either the district attorney who prosecuted the inmate or upon the district attorney for the county in which the inmate is confined. If the petition is served upon the district attorney for the county in which the inmate is confined, the court shall promptly notify the district attorney who prosecuted the inmate. Immediately upon appointing the psychiatric commissioners, the court shall direct that an examination of the convicted person promptly take place with all three of the psychiatric commissioners present at the same time. The court shall also direct, upon application of the inmate or the district attorney, that the inmate be examined by a qualified psychiatrist or certified psychologist designated by the inmate or the district attorney. Counsel for the inmate and the district attorney shall have the right to be present at each such examination. Upon the filing of a petition pursuant to subdivision two of this section, if the inmate does not have counsel and is financially unable to obtain counsel the

court shall appoint competent counsel experienced in the trial of criminal matters to represent the inmate.

4. The psychiatric commissioners must receive and consider evidence offered by the inmate's counsel and the district attorney, including written submissions, testimony and expert psychiatric evidence. The proceeding before the psychiatric commissioners shall be conducted on the record but need not be conducted in accordance with the rules governing the admission of evidence at trial, but counsel for the people and the inmate shall have the right to cross-examine witnesses.

5. When the proceeding before the psychiatric commissioners has been concluded, they must forthwith provide a transcript of the proceeding, together with their findings of fact, to the court with their opinion thereon. Unless impracticable, the psychiatric commissioners shall so act within sixty days from the filing of the petition. When an inmate shall be found incompetent by a majority of the psychiatric commissioners, the court shall accept such finding unless clearly erroneous, and promptly enter an order finding the inmate to be incompetent, staying the execution of the inmate and directing that the inmate be committed to a secure facility under the jurisdiction of the office of mental health if the inmate's incompetency is the result of mental illness. In all other cases, the inmate shall remain in the custody of the department. When an inmate is found competent by a majority of the psychiatric commissioners, the court shall accept such finding unless clearly erroneous, promptly enter an order finding the inmate to be competent and vacating any stay previously issued, and the court shall promptly inform the judge or justice who issued the warrant for the execution of the inmate of the court's finding. Upon being so informed, the judge or

justice shall promptly issue a new warrant in accordance with subdivision two of section six hundred fifty of this article. Any other provision of law notwithstanding, no other review, judicial or otherwise, shall be available with respect to an order finding the inmate to be incompetent or competent. If the court rejects the finding of a majority of the psychiatric commissioners on the ground that it is clearly erroneous, the court shall appoint another commission to proceed as provided in this section.

6. When an inmate has been committed to a secure facility pursuant to this section, the inmate shall remain there until the facility administrator determines that the inmate may be competent. Upon so determining, the facility administrator shall promptly notify the court that entered the order finding the inmate to be incompetent, and the court shall promptly notify counsel and the district attorneys and appoint another commission to proceed as provided in this section.

7. The court shall allow reasonable fees to the psychiatric commissioners. The court shall allow reasonable fees for time spent in court and for time reasonably expended out of court to counsel appointed pursuant to this section. The court shall allow all reasonably necessary costs, including without limitation the costs attendant to fees for the examination of the inmate by a qualified psychiatrist or certified psychologist, incurred by the inmate and the district attorney in connection with a petition pursuant to this section. Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source. All such fees and costs shall be a state

charge payable on vouchers approved by the court after audit by and on the warrant of the comptroller.

8. When a petition has previously been filed and determined pursuant to this section, the court in which a subsequent petition is filed or to which a subsequent petition is transferred, shall not issue an order staying the execution of the inmate unless the court finds, after notice to the district attorney who prosecuted the inmate and after affording the district attorney a reasonable opportunity to be heard in writing, that there is reasonable cause to believe that the inmate is incompetent; provided, however, that the court may issue an order staying the execution of the inmate, to the extent a stay is necessary to afford the district attorney an opportunity to be heard and such reasonable cause determination to be made.

§ 657. Proceeding when person under sentence of death is pregnant. 1. A sentence of death may not be carried out upon a woman while she is pregnant.

2. When the superintendent of the correctional facility where the inmate is confined is informed that reasonable grounds exist that a convicted person under sentence of death may be pregnant, the superintendent shall appoint a qualified physician to examine the convicted person and determine if she is pregnant.

3. Upon being informed by the superintendent that such convicted person is pregnant, the governor shall stay execution of the warrant to the extent necessary.

§ 658. Death penalty inflicted by lethal injection. The punishment of death shall be inflicted by lethal injection; that is, by the intravenous injection of a substance or substances in a lethal quantity into the body of a person convicted until such person is dead.

§ 659. Facility. The commissioner shall provide and maintain a suitable and efficient facility, enclosed from public view, within the confines of a designated correctional institution for the imposition of the punishment of death. That facility shall contain the apparatus and equipment necessary for the carrying out of executions by lethal injection.

§ 660. Persons authorized to be present at execution. 1. The commissioner, any persons designated by the commissioner to act as execution technicians or otherwise to assist in the execution, including correction officers, and a licensed physician or physicians may be present at the execution. The commissioner shall also select and invite the presence, by at least three days' prior notice, of a justice of the supreme court, the counsel for the convicted person, the district attorney and the sheriff of the county where the conviction was had, together with six adult citizens. The names of the execution technician or technicians shall never be disclosed, notwithstanding any other provision of law to the contrary, including article six of the public officers law. The names of the six adult citizens who witnessed the execution shall not be disclosed until after the execution.

2. The commissioner shall, at the request of the person sentenced to death, authorize and permit two clergymen to be present at the execution.

3. The inmate sentenced to death may name four relatives or bona fide friends to witness the execution, and the commissioner shall authorize said named relatives or friends of the inmate to witness the execution unless the commissioner determines that the presence of any named relative or friend at the execution would pose a threat to the safety or security of the designated correctional

institution. No person under eighteen years of age shall be permitted to witness any execution.

§ 661. Examination of convicted person's body and certificate. 1. Immediately after the execution an examination of the body of the convicted person shall be made by the licensed physicians present at the execution and their report in writing stating the nature of the examination and occurrence of death, so made by them, shall be annexed to the certificate provided for in subdivision two of this section and filed therewith.

2. The commissioner shall prepare and sign a certificate setting forth the time and place of the execution and stating that the execution was conducted in conformity to the sentence of the court and the provisions of this article. The commissioner shall cause the certificate to be filed, within ten days after the execution, with the office of clerk of the court in which the conviction was had.

3. The commissioner may appoint a deputy with the department to execute the warrant of execution and to perform all other duties imposed upon the commissioner under this article.

§ 662. Disposition of body. 1. Prior to the execution, the convicted person shall be given the opportunity to decide in writing to whom his or her body shall be delivered after the execution. The commissioner or his or her designee shall sign and authorize the convicted person's request if the request is not contrary to law. If the convicted person does not indicate to whom such person's body shall be delivered, or if the person's request is contrary to law, the commissioner may deliver the convicted person's body to a relative by blood or marriage or a bona fide friend. If the body is not claimed by a relative

or bona fide friend within seven days after execution, the body shall be delivered to a duly authorized and incorporated pathological and anatomical association in the state, if requested by an authorized association.

2. If the body of the convicted person is not claimed by a relative, bona fide friend, or a duly authorized and incorporated pathological and anatomical association, the commissioner shall cause the body to be disposed of in the same manner as are bodies of prisoners dying in the institution. Notwithstanding any other provision of law, no autopsy shall be required for the body of an inmate upon whom a sentence of death has been carried out.

§ 33. Subdivision 3 of section 112 of the correction law is REPEALED.

§ 34. The executive law is amended by adding a new section 63-d to read as follows:

§ 63-d. Attorney-general; death penalty prosecutions. 1. The attorney-general shall, whenever required by the governor or his designee after a request of the governor by a district attorney, direct that the resources and personnel of the department of law be used to provide assistance relating to the prosecution or appeal of any case where the defendant may be subject to the penalty of death. Such assistance shall include the use of any department resource or services, which the attorney-general deems proper, and may be performed or provided by the attorney-general or any employee of the department of law. Assistance pursuant to this section may only be provided with respect to proceedings where:

(i) the defendant is represented by counsel appointed pursuant to the provisions of section thirty-five-b of the

judiciary law or the defendant is receiving expert, investigative or other services pursuant to such section, or

(ii) the defendant, through counsel retained privately by the defendant through his or her own means or through the means of a person other than the defendant, or through representation by pro bono counsel, is able to marshal substantially greater legal and investigatory resources than those reasonably available to the district attorney.

2. A request of the governor made by a district attorney for assistance in a death penalty case shall be accompanied by a certificate of need stating that as a result of cases where the defendant may be subject to the penalty of death additional resources or personnel are needed to supplement the district attorney's staff and available resources in order to fulfill such district attorney's responsibilities.

§ 35. Section 837-a of the executive law is amended by adding a new subdivision 7 to read as follows:

7. Contract with an organization having substantial knowledge and experience in the prosecution of serious criminal matters for the development and provision of continuing legal education, training, advice and assistance for prosecutors in the prosecution of capital cases.

§ 36. The executive law is amended by adding a new section 837-l to read as follows:

§ 837-l. Capital prosecution extraordinary assistance program. There is hereby created within the division a capital prosecution extraordinary assistance program to be administered by the commissioner, to distribute funds to district attorneys for the prosecution of capital cases. Such funds shall be distributed where the commissioner

determines, on the basis of a written certification by the applicant district attorney, that due to the nature or number of capital cases being prosecuted by the district attorney a significant financial burden has resulted and financial assistance is necessary in order to fulfill such district attorney's responsibilities; provided, however, that such funds shall not be used to supplant existing resources. Such funds may also be distributed to a district attorney who, upon the request of another district attorney, has provided assistance in the prosecution of a capital case.

§ 37. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, part or provision thereof.

§ 38. This act shall take effect on the first day of September next succeeding the date on which it shall have become a law and shall apply only to offenses committed on or after such date; offenses committed prior to such date shall be governed by the provisions of law in effect at the time the offense was committed; provided, further, however, that sections twenty-nine, thirty-five and thirty-six of this act shall take effect April 1, 1995.